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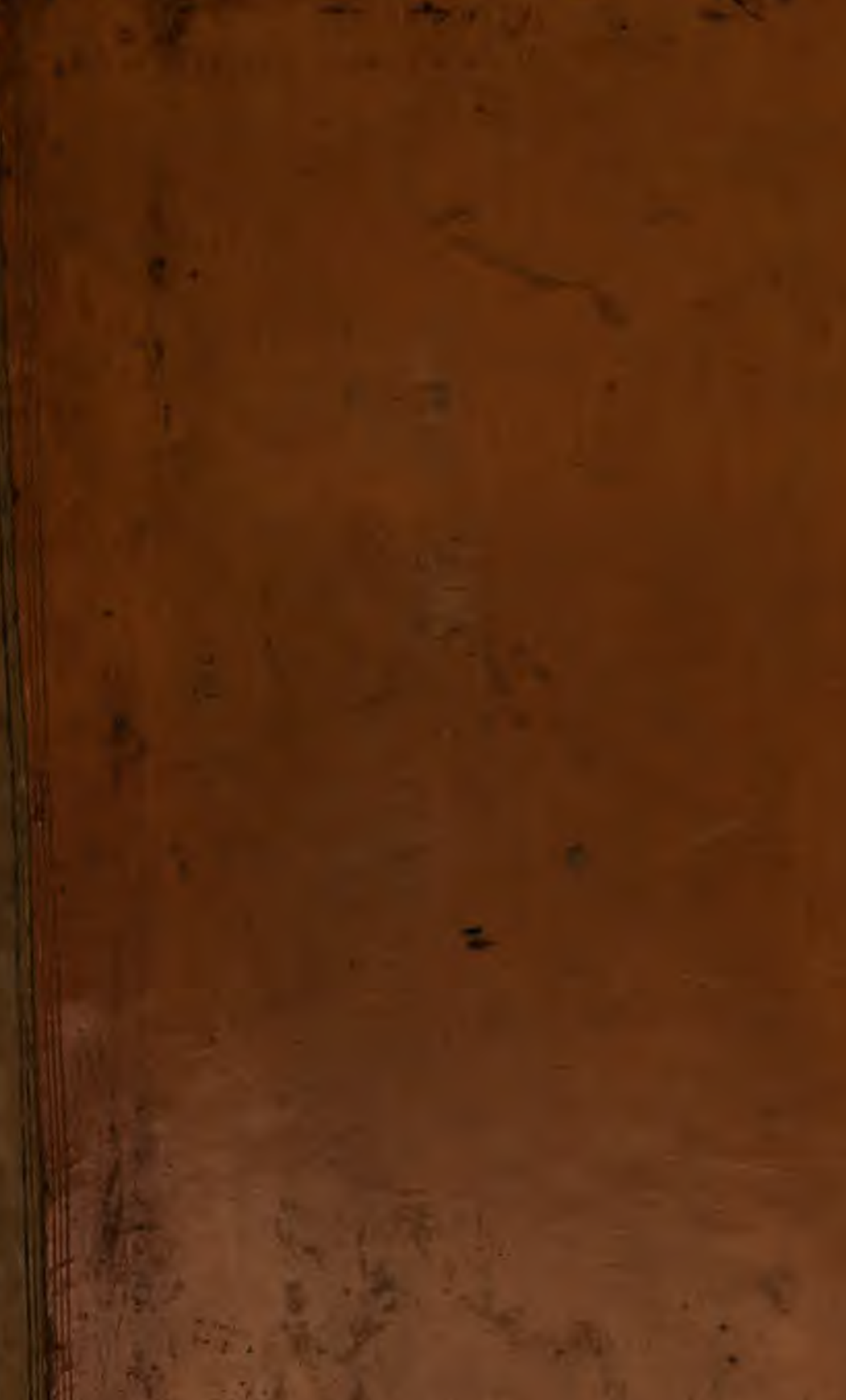
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THE  
EXCHEQUER REPORTS.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Courts of Exchequer & Exchequer Chamber.

VOL. III.

HILARY VACATION, 21 VICT., TO MICHAELMAS VACATION,  
22 VICT., BOTH INCLUSIVE.

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BY

E. T. HURLSTONE, OF THE INNER TEMPLE,

AND

J. P. NORMAN, OF THE INNER TEMPLE,

ESQUIRES, BARRISTERS-AT-LAW.

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**J U D G E S**  
**OF THE**  
**C O U R T   O F   E X C H E Q U E R ,**

**DURING THE PERIOD COMPRISED IN THIS VOLUME.**

---

**The Right Honourable Sir FREDERICK POLLOCK, Knt., Chief Baron.**

**BARONS.**

**Sir SAMUEL MARTIN, Knt.**

**Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.**

**Sir WILLIAM HENRY WATSON, Knt.**

**Sir WILLIAM FRY CHANNELL, Knt.**

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**ATTORNEYS-GENERAL.**

**Sir RICHARD BETHELL, Knt.**

**Sir FITZROY KELLY, Knt.**

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**SOLICITORS-GENERAL.**

**Sir HENRY SINGER KEATING, Knt.**

**Sir HUGH M'CALMONT CAIRNS, Knt.**



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## ERRATA.

Page 323, marginal note, line 17 from the top, *for* "or" *read* "in other words."

Page 339, line 11 from the top, *for* "in ultra" *read* "intra."

# Exchequer Reports.

HILARY VACATION, 21 VICT.

COOMBS v. THE BRISTOL AND EXETER RAILWAY  
COMPANY.

1858.

Feb. 12.

THE declaration stated that the defendants being common carriers for hire, the plaintiff delivered to the defendants as such common carriers, and the defendants as such carriers received from the plaintiff certain goods of the plaintiff, to wit, a packet of whalebone, to be safely and securely carried by the defendants from Exeter to Bristol and there to be delivered by the defendants for the plaintiff, for reward in that behalf. And although a reasonable time in that behalf had elapsed before this suit: Yet the defendants made default in carrying and delivering the said goods, and also whilst they so had the said goods for the purpose aforesaid, so negligently and improperly carried the same, that by the default, negligence, and improper conduct of the defendants in that behalf, the said goods were wholly lost to the plaintiff, &c.

To an action against a carrier for the loss of the plaintiff's goods, it is no answer that the goods were delivered to the defendants by A., who, as consignor thereof, claimed compensation for the loss, and that the defendant paid him, as such consignor, without notice that he was the agent of the plaintiff, and believing that he delivered the goods on his own account, and was the person entitled to sue.

Plea.—That the said goods were delivered to the defendants by, and were received by them from, one Charles Avery, to be carried from Exeter to Bristol and at Bristol to be delivered to the plaintiff; and that the said goods having been accidentally lost, and the said C. Avery, as the consignor thereof, having claimed from the defendants compensation

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for such loss, the defendants before the bringing of this action paid to him as such consignor, and the said C. Avery accepted from them, a large sum of money as the full value of the said goods and in satisfaction and discharge of the said claim.—Averment: that the defendants had not, either at the time of the delivery and acceptance of the said goods or afterwards down to and at the time of the payment aforesaid, notice, either from the plaintiff or otherwise, that the said C. Avery, in delivering the said goods to be carried as aforesaid, was acting for or on behalf of the plaintiff, or was his agent for such delivery: and that the payment aforesaid was made by them in the bonâ fide belief that the said goods were delivered to them by C. Avery on his own account, and that he was the person entitled to claim and receive satisfaction for the loss thereof.

Demurrer and joinder therein.

*Prideaux*, in support of the demurrer.—The plea admits that the contract was made with the plaintiff, that the goods were the plaintiff's, that they were to be delivered to the plaintiff, and that they were lost; but it sets up as an answer that the goods were received by the defendants from a third person, who, as consignor, claimed compensation for their loss, and that the defendants paid him the value of the goods, they not having had at any time notice that he was the mere agent of the plaintiff. Those facts afford no defence whatever to the action. The only contract disclosed on the record is a contract with the plaintiff, and it is no answer to say that another person has been compensated for the breach of it.—The Court then called on

*Kinglake*, Serjt., to support the plea.—The action is not by the plaintiff, as owner of the goods, for their conversion, but is founded on the contract to carry. The plea

admits that the goods are the plaintiff's, but alleges that the contract was entered into with a person who, though he might be the agent of the plaintiff, did not disclose that fact. The simple relation of consignor and consignee does not raise any presumption that the goods belong to the consignee. It is not alleged in the declaration that the contract was made with the plaintiff, and the plea shews that it was made with the consignor of the goods, without notice to the defendants that he was not the owner of them. The case, therefore, falls within the rule of law, that where an agent is allowed to deal in his own name with his principal's goods, the party with whom he deals has the same rights against the principal as he might have exercised against the agent, if he had really been a principal: *Smith's Mercantile Law*, p. 168, 5th ed.; *Sims v. Bond* (a). [Martin, B.—The plea does not say that Avery delivered the goods to the defendants, as consignor. It is consistent with every allegation in it, that the plaintiff, being owner of the goods, may have delivered them to a porter to take to a receiving office of the railway Company, and that after they were lost the porter, pretending to be the real owner of them, got paid for them.] Where goods are merely sent on approval, the consignor is the proper party to bring the action: *Swain v. Shepherd* (b). So, where by the bill of lading the goods are to be delivered for the consignor, and in his name, to the consignee: *Sargent v. Morris* (c). Also where the bill of lading is special to deliver to A. for the use of B.: *Evans v. Marlett* (d). [Martin, B., referred to *Dunlop v. Lambert* (e).] In Maude and Pollock on Shipping, p. 149, it is said:—“The general rule with respect to the party to sue in case

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(a) 5 B. &amp; Adol. 389.

(d) 1 Ld. Raym. 271.

(b) 1 Moo. &amp; R. 223.

(e) 6 Cl. &amp; F. 600.

(c) 3 B. &amp; Ald. 277.

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of the loss or of damage to goods carried in a general ship, is that the action should be brought in the name of the person who has employed the carrier. For the right to compensation flows from the contract of carriage, and can only be enforced by the party with whom that contract was made."

MARTIN, B.—I am of opinion that the plea is bad. It only states that the goods were delivered to the defendants by the hand of Avery, and being lost, he claimed compensation *as the consignor* of them, which was paid to him. The declaration states that the plaintiff delivered his goods to the defendants, to be carried by them from Bristol to Exeter, and there to be delivered by them for him: therefore he was the consignor of the goods. The plea states that the goods were delivered to the defendants, and received by them from Avery; but that is nothing more than a statement that Avery's was the hand which brought the goods to the office of the defendants. It is not stated that Avery was the consignor; but only that, as consignor, he claimed compensation for the loss, and, as consignor, he was paid. The plea carefully avoids alleging that Avery was the party who made the contract; and therefore the authorities, collected in the note to Wms. Saund., vol. 2, p. 47 b, as to whether the consignor or consignee should sue, do not apply. Avery could not maintain any action for the loss of the goods, because, upon all that appears upon the pleadings, he was the mere hand which delivered them to the defendants. The plea only discloses that the plaintiff employed Avery to deliver his goods to the defendants, and that the defendants paid for their loss to Avery, who had no right whatever to receive the compensation.

BRAMWELL, B.—I am of the same opinion. If the declaration be read as upon a contract by the defendants to

carry, the plaintiff saying that the contract was with him, the plea, not denying that, but saying that it was with some one else, would clearly be bad. Perhaps the defence intended to be set up is this:—"we contracted with Avery as principal, not knowing that he was agent, and not supposing that you were the principal, and we have paid him for the loss; we should therefore be prejudiced if you could sue on a contract made by him as your agent." If the plea contained such a statement, the case might be different; but it does not. Even then it might be doubtful whether it would afford any answer to the declaration, and for this reason.—I can well understand, that if the defendants had made the contract with Avery as principal, and Avery had afterwards said, "I have changed my mind, keep the goods at the office till I call for them," the plaintiff would be wrong in suing the defendants for their non-delivery, after having allowed them to deal with Avery as principal. But here the declaration states that the contract was with the plaintiff: the defendants, by their plea, say that, "having broken a contract entered into with Avery, upon the supposition that he was the principal, we do not pay you because we have paid him." There is no case like that. It has been held that there is a right of set-off against an unknown principal, though it has been doubted whether the same rule applies where the action is for unliquidated damages. But certainly the rule has no application to a case like this, where a person says, "I am entitled to sue, give me compensation,"—and it is given, whether he is or is not entitled to it. As already pointed out by my brother *Martin*, the plaintiff states that the contract was made with him, and that the defendants have broken it: the defendants do not deny that; but only say that some one who delivered the goods to them claimed compensation, and they paid him.

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WATSON, B.—I concur in the view of my brothers *Martin* and *Bramwell*. The declaration is on a contract by the defendants with the plaintiff; the goods are the plaintiff's, and they were lost. Now, if goods are delivered to a carrier to be forwarded to their place of destination, that may or may not be a contract with the consignee. In the case of vendor and vendee, the consignor does not act as the agent of the consignee, but on his own behalf; and up to the moment of the delivery of the goods to the carrier, the property is in him. Upon the delivery, the goods become the property of the vendee, subject to the vendor's right of stoppage in transitu. Therefore, if the goods are damaged or lost, before the carrier pays the consignor, he should ascertain whether the property is in him; otherwise he would pay in his own wrong if it should turn out that the property was in the vendee; for in that case the contract is with him alone. I not only concur in the view of my learned brothers, but I take this broader ground, that, unless it be shewn that Avery was the owner of the goods, the contract arising from the delivery was with the plaintiff; therefore he alone is entitled to sue.

Judgment for the plaintiff.

---

1858.

*Indy. Aff. 11: 5000*  
*34 & 702.*  
 Feb. 25.

## HILL v. LEVY and Another.

**T**HIS was a special case, stated for the opinion of this Court.

*Malcolm Kerr* argued for the plaintiff (Feb. 12), and *Joyce* argued for the defendants. The facts of the case and arguments fully appear in the judgment.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

WATSON, B.—This is an action to recover the sum of 3s. 1d., for work done. The plea was “never indebted.” The cause came on for trial before the Lord Chief Baron,

Disputes having arisen between compositors and master printers as to payment to the former for printing advertisements on wrappers, the following rules were made by a committee of each body:—  
 “Wrappers. The compositor on a magazine or review to be entitled to the first or title page of the wrapper of the magazine or

review, but not to the remaining pages of such wrapper or to the advertising sheets which may accompany the magazine or review. Standing advertisements or stereo-blocks forming a complete page, or when collected together making one or more complete pages in a wrapper or advertising sheet of a magazine or review, not to be charged. The compositor to charge only for his time in making them up. The remainder of the matter in such wrappers or advertising sheets, including standing advertisements or stereo-blocks not forming a complete page, to be charged by the compositor and cast up according to certain articles of the scale referred to, as they may respectively apply.” In the November number of a Monthly Magazine there was composed and printed on one page two advertisements which occupied the entire page, and the type of which was left standing. In the December number, the same two advertisements were printed, but on different pages: and each occupied about half a page and the remainder of the page was filled up by other advertisements. The plaintiff, who was a compositor, insisted that, under the latter part of the rule, he was entitled to charge for the composing; the defendant, who was the master printer, contended that the case was within the first part of the rule, and that the plaintiff was only entitled to charge “for his time in making up.” In the year 1856, a similar dispute arose between a compositor and a master printer, and the matter having been referred to arbitration in pursuance of certain rules which were still in force, three arbitrators awarded in favour of the master. The plaintiff entered the defendant’s service with knowledge of that decision, and that the defendant had been one of the arbitrators; nothing, however, was said as to the terms of payment; but both parties understood that it was to be made according to the rules.

*Held:* First, that the decision of the arbitrators was not, at the time of the employment of the plaintiff, binding between the parties as an interpretation of the rule; and that notwithstanding their decision it was competent for the Court to entertain the question of its construction.

Secondly, that the plaintiff was entitled to recover for the composing; the true construction of the rule being: that the compositor may charge according to the scale when any advertisement not standing is inserted in the same page with a standing advertisement, but that when standing advertisements are printed in the same page so as completely to fill it, the compositor is only entitled to charge for his time in making up.



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when, by consent, a verdict was entered for the plaintiff, subject to a special case to be stated by Mr. Barstow.

A case has been stated accordingly, and it has been argued before us. The facts, in substance, are these. The plaintiff is a compositor, and the defendants are printers, and print a monthly periodical, called "The National Magazine." On the outside of the magazine there are wrappers or sheets on which advertisements are printed. It is a practice, when advertisements are likely to be published in the succeeding numbers, to allow the type to be kept standing, in order to be employed in the reprinting.

For more than fifty years the business of printing in London, as between the master printers and compositors, has been regulated by committees of each body, who have, from time to time, agreed upon rules which, so long as they remain unaltered, are treated and acted upon as binding between master and compositor, and are imported into every engagement to which they are applicable; and the plaintiff and defendants respectively are to be taken as bound by these rules.

The business of printing advertisements upon wrappers much increased, and some years ago disputes arose as to the payment to be made to the compositor for his labour in respect of them. An arrangement was come to between the committees in 1839, which is as follows.—

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The companionship (which means the compositor) on a magazine or review, to be entitled to the first or title page of the wrapper of the magazine or review, but not to the remaining pages of such wrapper, or to the advertising sheets which may accompany the magazine or review.

Standing advertisements, or stereo blocks, forming a complete page, or, when collected together, making one or

more complete pages in a wrapper or advertising sheet of a magazine or review, not to be chargeable. The compositor to charge only for his time in making them up. The remainder of the matter in such wrappers or advertising sheets, including standing advertisements or stereo blocks, not forming a complete page, to be charged by the compositor and cast up according to the 8th and 20th articles of the scale as they may respectively apply."

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For the November number, 1856, of the National Magazine, there was composed and printed upon one page two advertisements, one of "Mayall's Photographic Gallery," and the other of "Approved Educational Works for schools and families." These two occupied the entire page, and the type of both remained standing. In the December number there were printed the same two advertisements, but the latter was printed in a page (and as we understand by the directions of the defendants) different from that in which the former was printed. Each advertisement occupied about half the page, and the remainder of each page was filled up by other advertisements. The plaintiff was the compositor, and insisted that, upon the true construction of the above rule, he was entitled to charge under the latter part of the rule; and if so, he is entitled to recover the sum claimed of 3s. 1d. Upon the other hand, the defendants contend that the case comes within the first part of the rule, and that the plaintiff is only entitled to charge *for his time in making up*; and if so, the plaintiff has been paid, and the defendants are entitled to succeed.

In 1856, the following rules were agreed to:—"Rules relating to the arbitration committee, as finally adopted, January 17, 1856."

1st. The object of the arbitration committee.—To avoid referring trade disputes to Courts of law.

2nd. Such arbitration committee shall consist of three

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masters, to be nominated by the masters in whose office the dispute shall have taken place, and three journeymen who shall not be employed in the said office, to be nominated by the journeymen and be presided over by a barrister, as chairman, who shall be appointed annually by the two committees of masters and journeymen, and who in all cases of division in which the votes of the arbitrators are equal shall decide the question at issue by his casting vote.

3rd. Disputes referred to an arbitration committee must be adjudicated upon within two months from the date of the dispute being referred to such committee, unless an extension of time be mutually agreed upon by the contending parties or deemed necessary by the barrister.

4th. The fee of barrister and hire of rooms to be paid by the party against whom the decision may be given.

5th. Either party neglecting to appoint their members of the arbitration committee within one month after the claim has been made in writing for the appointment of such committee, or refusing to refer the matter in dispute to arbitration, to be considered as having received an adverse decision.

6th. That the scale of 1810, with the additions, definitions, and explanations as arranged at a conference of master printers and compositors held in 1847, form the basis of the decisions of the committee: that when the arbitrators consider the words of the scale ambiguous, their application to the particular case in dispute doubtful, or that they have in reference to the question under consideration ascertained established usages, they shall be taken as decisive; but when trade practices are found to be so varied as not to constitute "custom," the award shall be based on equity and analogy.

7th. That these rules shall be considered as having come

into operation on the 1st day of January, 1856, and shall continue in force until written notice to discontinue them be given by either committee; such notice not to take effect until after three months from the time of its delivery.

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In September, 1856, a case arose, raising the very question now in dispute, between two persons, A. and B. The matter was referred to three masters and three journeymen and a barrister, in accordance with the Article 2. Before proceeding on the arbitration, the secretary of the committee of masters stated that it was understood that the decision was to be a guide to the trade in future; but the secretary of the committee of the compositors stated that it was not so, and that the decision was to be confined to the particular case and was not to be taken as a settlement of future advertisement cases. The masters and journeymen disagreed and the barrister decided in favour of the view taken by the masters and by the defendants in the present case. The decision and award was made in September 1856. After this time the plaintiff went into the defendant's employ. He had heard of the decision, and that one of the defendants had been one of the masters' arbitrators. Upon the occasion of his employment nothing was said as to the barrister's decision or as to the terms of payment; but both parties understood that payment was to be made according to the rules.

The questions for the opinion of the Court are two.—First: whether the decision of the barrister was, at the time of the employment of the plaintiff, binding between the parties as an interpretation of the scale of payment (or in other words, of the rule,) as to standing matters for advertisement.

We are clearly of opinion that it was not. There is nothing in the articles as to arbitration to make it so. It

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was binding and conclusive between A. and B., the then litigant parties; but there is nothing to give it any further or greater effect. The opinion of the learned barrister is entitled to every weight and consideration; but it does not operate by way of estoppel, as putting a final and conclusive construction upon the rule. For the purpose of this question, we may assume the decision of the barrister to be clearly wrong; and the contention on behalf of the defendants is, that the Court is bound by his decision although we consider it wrong. We see nothing in the articles of arbitration to give it this effect, and are clearly of opinion that it is competent for the Court to entertain the question of the construction of the rule, and that they are not conclusively bound by the opinion of the barrister.

The second question is, whether, according to the true interpretation of the scale (or rule), the plaintiff is entitled to recover.

It is said that this is a matter of very great interest to the trade, and we therefore took time to prepare a written judgment. We are of opinion that the plaintiff is so entitled. We think it clear that the paragraph or sentence of the rule beginning "standing advertisements" has reference to the wrapper or advertisement sheet then about to be composed and printed, and that the master has the right to direct in what manner they shall be printed. He may direct that they all, as far as possible, be put into complete pages; or that they be distributed through the wrappers or advertising sheets, as he may think fit. The first provision of the part of the rule before quoted, is for the case of standing advertisements forming a complete page. This seems directed to the case of a page of the former number being reprinted in the succeeding one. The second case is of the standing advertisements collected

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together making one or more complete page or pages in the wrappers or advertising sheets. We think this refers to the case when the master shall direct that standing advertisements shall be printed in the same page or pages, so far as they will fill up. In such case, when they completely fill a page or pages, the advertisements are not to be chargeable according to the scale, but the compositor is only entitled to charge for his time in making up. But if any standing advertisements are left over, or if the master thinks fit to direct that they shall be distributed through the other pages of the advertising sheet, so that they do not form a complete page, we think that the latter part of the rule applies and that the compositor is entitled to charge according to the scale.

In our opinion this is the meaning of the rule. The contention of the defendants amounts to this, that the first part of the rule is to be read thus, viz., "If when collected together the standing advertisements would make a page or pages if put together." This is certainly not what the words primarily express, if indeed they express it at all; but the latter part of the rule, and contrasting the word "forming" with the word "making," in our opinion proves that the true meaning is, that the compositor is to charge according to the scale when any advertisement not standing is inserted in the same page with a standing advertisement.

Judgment for the plaintiff.

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*Indgt. aff'd in Ex. Ch.  
44 + N565.  
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The plaintiff, a bankrupt, who had obtained an order for protection to complete his examination, under the 112th section of the Bankrupt Law Consolidation Act, 1849, at the time of his bankruptcy owed two poor rates, and had been assessed to a third, but such third rate was not allowed or published until after his bankruptcy. The defendants, overseers of the poor, during the continuance

of such protection, summoned the plaintiff for the nonpayment of the three rates. The plaintiff did not attend before the justices. It did not appear what took place at the hearing, but it was shewn that the plaintiff had returned the summons served on him to one of the defendants, who was the assistant overseer, with the facts respecting his protection written upon it. The justices issued a distress warrant for the three rates, which proving ineffectual, a warrant of commitment issued upon which the plaintiff was taken, carried to prison and kept there during the period of protection granted to him.

*Semble*, that under such circumstances no action could be maintained by the plaintiff against the defendants.

But *Held*: First, that there was no absence of reasonable and probable cause for supposing that the Court of Bankruptcy had not power to protect the plaintiff from arrest in respect of the rates made before, but not allowed till after the bankruptcy.

Secondly, that there was no absence of reasonable and probable cause for supposing that the protection granted to the plaintiff did not avail against the warrant for arrears of all the rates.

Thirdly, that in the absence of any evidence that the defendants had concealed anything or done anything but speak the whole truth before the justices, there was no evidence of malice.

Fourthly, that trespass would not lie against the defendants for causing the plaintiff to be arrested under the warrant.

*Held*, also, that the remedy given by the 113th section does not affect the right of action of a bankrupt wrongfully arrested in violation of the privilege given by the 112th section.

*Semble*, that the protection under the 112th section does not extend to a warrant of commitment for nonpayment of poor rates made before but not published or allowed by the justices till after the bankruptcy.

*Quære*, whether bankruptcy, before certificate, has any operation upon a demand for poor rates.

which was still unexpired at the time of the grievances, &c., of which the defendants had notice. Averments. —That while the plaintiff was such bankrupt, &c., and while the adjudication was in force, and while the plaintiff was free from arrest pursuant to the said Act by any creditors, the defendants wrongfully, maliciously and without any reasonable or probable cause, caused to be made and obtained from T. B. and C. B., Esquires, two of her Majesty's justices of the peace, &c., having lawful authority, &c., a certain warrant of commitment under the hands and seals, &c., addressed to the overseers, &c., whereby the said overseers, &c., were commanded to take the plaintiff and him safely convey to the borough gaol of Cambridge, and there deliver him to the keeper, &c., and the keeper was thereby commanded to receive the plaintiff, and to imprison him unless the sum of 1*l.* 16*s.* 6*d.*, and the sum of 1*l.* 16*s.* 7*d.*, and the sum of 1*l.* 16*s.* 6*d.*, making together a sum of 5*l.* 9*s.* 7*d.*, and certain sums for costs, &c., making together 6*l.* 5*s.* 7*d.*, should be sooner paid to the said keeper, and that the said sums of 1*l.* 16*s.* 6*d.*, 1*l.* 16*s.* 7*d.*, and 1*l.* 16*s.* 6*d.* were sums which before and at the time of the said adjudication the plaintiff had been rated and assessed, by rates and assessments for the relief of the poor of the parish of St. Andrew the Less, therefore duly made, allowed and presented, dated respectively the 21st day of July 1856, the 17th of November 1856, and 22nd of January 1857, which at the time of the grievances were in arrear and due from the plaintiff to the defendants Naylor and others, as overseers, before and at the time of the adjudication; and that the defendants before and at the time of the adjudication and at the time of the making and obtaining and of the executing the said warrant of commitment, were creditors of the plaintiff within the meaning of the Act, and entitled to prove under the bankruptcy, and to receive

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a dividend, &c.: that the defendants after the warrant had been obtained, and while the plaintiff was bankrupt and so free, &c., wrongfully and maliciously, and without any reasonable or probable cause, caused the warrant to be delivered to J. W., one of the constables, &c., and required J. W. to execute the same; and that J. W. thereupon took the plaintiff, then still being such bankrupt, &c., and so free, &c., and conveyed him to the said gaol, &c., and the plaintiff was there imprisoned in default of payment for eighteen days, at the expiration of which time he was discharged by order of one of the Commissioners of the Court of Bankruptcy.

Second count.—That the defendants assaulted the plaintiff, and gave him into custody, &c.

Plea.—Not guilty (by statute).—Whereupon issue was joined.

At the trial before Lord *Campbell*, C. J., at the last Cambridgeshire Summer Assizes, it was proved that the plaintiff had been the occupier of a public house in Cambridge, and on the 3rd of August, 1856, was duly assessed to a poor rate. On the 22nd of November, 1856, he was assessed to another; and on the 31st of January, 1857, he was assessed to a third rate, the amount of the last being 1*l.* 16*s.* 6*d.* On the 24th of January, 1857, he was adjudicated a bankrupt on his own petition. On the 5th of February he obtained a protection under the 112th section of the Bankrupt Law Consolidation Act until the 5th of March, which was afterwards extended until the 7th of April. On the 24th of January the messenger in bankruptcy took possession of all the plaintiff's goods, and on the 5th of March all his goods were sold. In February the defendant Moody, who was the assistant overseer, applied at the plaintiff's house for the payment of the poor rates. The plaintiff told him that he was a bankrupt, and that he

had obtained his protection from the Court of Bankruptcy. It was alleged that Moody saw the messenger in possession. Moody said that the protection was of no avail against a claim for poor rates. The other defendants, on being appealed to, refused to interfere, having previously held a meeting, at which they determined that the plaintiff should be arrested. Moody then served a notice on the plaintiff to pay the rates in ten days, or legal proceedings would be taken. On the 13th of February Moody applied to the justices and obtained a summons in the usual form for the non-payment of the rates. The plaintiff wrote upon the summons that his goods were under the protection of the Court of Bankruptcy, and that the rates would be paid out of the estate, and left it at Moody's house. He did not appear before the justices, and they granted the usual distress warrant for the several rates. To this the constable made a return that he found no goods whereon to levy. On the 16th of March a warrant was issued by the justices, commanding the constable to arrest the plaintiff and convey him to gaol, to be kept there for one month unless the rates and expences were sooner paid. All the proceedings were in due form, and as prescribed by the act of parliament. On the 19th of March the constable arrested him, when he produced his protection; he was then released. On the 23rd of March he was again arrested by the constable, and was kept in custody until the 7th of April, when he was discharged by order of a Commissioner of bankrupts. The plaintiff's solicitor had warned Moody and the officer of the consequences of arresting the plaintiff after he had obtained his protection, and told them that the officer would be liable to penalties if they did. They said they would "chance all that."

The defendants' counsel objected that this action was not maintainable, and that the plaintiff's only remedy was

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by an action against the officer for penalties under the 113th section of the Bankrupt Law Consolidation Act, 1849: they referred to *Magnay v. Burt* (a). The learned Judge thought that the action was maintainable, and he told the jury that the defendants appeared to have acted in a very arbitrary manner, and without reasonable or probable cause for the arrest, and he asked the jury whether they thought that the defendants had acted maliciously. The jury found that the defendants acted maliciously, whereupon a verdict was entered for the plaintiff; leave being reserved to the defendants to move to enter the verdict for them.

*Couch*, in last Michaelmas Term, obtained a rule to shew cause why the verdict should not be entered for the defendants, on the grounds that upon the facts proved no action would lie against the defendants, and that there was probable cause for obtaining the warrant of commitment; or why a new trial should not be had, upon the ground of misdirection in holding that there was not probable cause, and that there was evidence of malice, to be left to the jury; or why the judgment on the first count should not be arrested.

*Wells*, Serjt., and *Keane*, now shewed cause (b).—First, an action may be maintained for arresting a bankrupt who is free from arrest under the 112th section. *Ex parte Helsby* (c), which was decided upon a similar section in the former bankrupt Act, is an authority for that position, and it is confirmed by *Ex parte Leigh* (d). In *Magnay v. Burt* (a), where it was held that no action would lie for arresting

(a) 5 Q. B. 381.

*Watson*, B., and *Channell*, B.

(b) In Hilary Term, Jan. 19.

(c) 1 Mont. & Bligh, 79.

Before *Pollock*, C. B., *Martin*, B.,

(d) 1 Gl. & J. 264.

a person attending under a summons from a Court, the decision proceeded on the ground that the privilege was the privilege of the Court. Here however the privilege is not that of the Court, but a right conferred on the bankrupt by the statute. The defendants were creditors of the bankrupt within the meaning of the 112th section: *Lloyd v. Heathcote* (a). [Martin, B.—That case amounts to no more than this, that a refusal to see the collector was evidence of a general denial to creditors.] The case of *In re Wetherell and Courthope* (b), before Erle, J., in the Bail Court, is an authority that the defendants might have proved for the rates. The last rate was made before the bankruptcy. The allowance by the justices, which was after the bankruptcy, is merely a ministerial act. [Pollock, C. B.—It was not a good rate or demandable till they had allowed it.] This last rate, though not immediately payable, was a debt proveable as a contingent liability under sections 177, 178. [Couch referred to 17 Geo. 2, c. 3, s. 1.] *Grace v. Bishop* (c) is no authority that the liberty granted to the bankrupt did not protect him from arrest in respect of this rate. There the defendant had passed his final examination. The words “by any creditor” do not occur in the 162nd section. These words in the 112th section shew that it is intended to apply to all creditors, whether their debts became due before or after the bankruptcy. If that construction be not put on the Act, and if any new creditor could imprison the bankrupt, the object of the provision, viz. that the bankrupt should be at liberty that he might be examined for the benefit of the creditors generally, would be defeated. [Pollock, C. B.—He is not to be free from arrest under criminal process. The section only applies to civil process at the suit of creditors.] The 113th section

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(a) 2 B. &amp; B. 388.

(b) 1 L. M. &amp; P. 60.

(c) 11 Exch. 424.

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does not affect the plaintiff's remedy by action. [*Pollock*, C. B.—We all think that the 113th section merely gives a cumulative remedy, and does not deprive a bankrupt wrongfully arrested of his remedy by action.] The learned Judge thought that there was a want of reasonable and probable cause, and evidence of malice. [*Pollock*, C. B.—The defendants appear to have gone before a magistrate and stated a case which, so far as it went, was true. The plaintiff did not choose to attend, though repeatedly summoned. *Martin*, B.—Suppose a man knowing that a debt has been paid, brings an action in a Superior Court, gets judgment and arrests the defendant, could it be contended that an action would lie against him? *Pollock*, C. B., referred to *Marriot v. Hampton* (a). *Channell*, B.—It is clear that the count in trespass cannot be sustained. *Couch*.—*Yearsley v. Heane* (b); *Tarlton v. Fisher* (c); and *Noel v. Isaac* (d), are authorities to that effect.]

*Couch* and *Naylor*, who appeared to support the rule, were not called upon.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

MARTIN, B.—This was an action tried before Lord Campbell, C. J., at the last Cambridgeshire Assizes. The declaration contained two counts. The first stated that the defendants were overseers and assistant overseer of the parish of Saint Andrew the Less in Cambridge; that the plaintiff was a bankrupt and was entitled to the freedom and protection from arrest conferred by the 112th section

(a) 7 T. R. 269.

(b) 14 M. & W. 322.

(c) 2 Doug. 671.

(d) 1 C. M. & R. 753.

of the Bankrupt Act, 12 & 13 Vict. c. 106, of which the defendant had notice: that the defendants maliciously, and without reasonable and probable cause, caused two justices of the borough of Cambridge to make a warrant of commitment, directed to the constable and others, commanding them to take the plaintiff and imprison him for one month, unless three poor rates and the costs, amounting to 6*l.* 5*s.* 7*d.*, were sooner paid, which rates had been duly made before the bankruptcy, and were then due and in arrear by the plaintiff, and for which the overseers were creditors of the plaintiff, and entitled to a dividend out of his estate: that whilst the plaintiff was so protected and free from arrest the defendants wrongfully and maliciously, and without any reasonable or probable cause, caused the warrant to be delivered to the constable, who took the plaintiff and imprisoned him under it. The second count was, trespass for false imprisonment. The plea was, not guilty, by statute.

The facts proved were these:—The plaintiff had been the occupier of a public-house in Cambridge, and on the 3rd of August, 1856, was duly assessed to a poor rate; on the 22nd of November, 1856, he was assessed to another, and on the 31st of January, 1857, he was assessed to a third, the amount of the last being 1*l.* 16*s.* 6*d.* On the 24th of January, 1857, he was adjudicated bankrupt upon his own petition. On the 5th of February he obtained a protection under the 112th section of the Bankrupt Act until the 5th of March, upon which day the protection was extended to the 7th of April. On the 5th of March all his goods were sold. We think it must be taken that the defendants, against whom the verdict was found, had notice of all these facts. In February the rates were demanded of him by the defendant Moody, the assistant overseer, and a notice

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left for payment in ten days or legal proceedings would be taken to enforce them. On the 13th of February Moody applied to the justices and obtained a summons in the usual form, requiring the plaintiff to appear before them for the non-payment of the rates. The plaintiff wrote upon the summons that his goods were under the protection of the Court of Bankruptcy, and the rates would be paid out of the estate, and left it at Moody's house. He did not appear before the justices, and they granted the usual distress warrant. To this a return was made of nulla bona, and thereupon, on the 16th of March, a warrant was issued by the justices, commanding the constable to arrest the plaintiff and commit him to gaol, to be kept for one month, unless the rates and expences were sooner paid. All the proceedings were in due form and as prescribed by the act of parliament. On the 19th of March the constable arrested him, and he produced his protection; he was then released. On the 23rd of March he was arrested again by the constable. We think it must be taken that this was done by the direction of the defendants, against whom the verdict passed. He was kept in custody until the 7th of April, when he was discharged by the order of a Commissioner of bankrupts. Lord *Campbell*, C. J., was of opinion that the defendants acted without reasonable cause, and the jury found that they acted maliciously, and a verdict was found for the plaintiff for 80*L* damages. Leave was reserved to the defendants to enter a verdict for them on both counts, and the plaintiff was to have leave to sustain the verdict on either count. A rule to enter the verdict for the defendants, and also for a new trial, was granted, and cause has been shewn against it.

The 112th section enacts, that if a bankrupt be not in prison (which the plaintiff was not) he shall be free from

arrest and imprisonment by any creditor in coming to surrender, and after such surrender during all the time limited for it, and for such further term as shall be allowed him for finishing his examination, and for such further time after finishing his examination, until his certificate be allowed, as the Court shall by indorsement upon the summons think fit to appoint.

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One question submitted to us was, whether the plaintiff was free from arrest and imprisonment for poor rates at all; and it was alleged with great confidence that there was nothing in the statute to prevent his arrest for the poor rate which became due on the 31st of January, 1857, after his bankruptcy, and that for this rate, at all events, the plaintiff was liable to be arrested. The 162nd section in this Act corresponds with the section in the old Bankrupt Act (6 Geo. 4, c. 16, s. 118,) which followed the one similar to the 112th, in the old Act. It enacts, that at the last examination it should be lawful for the Court to adjourn that examination *sine die*, and in such case the bankrupt shall be free from arrest or imprisonment for such time as the Court should by indorsement on the summons of the bankrupt think fit to appoint. Looking at the two sections, we think that, to say the very least, there is very great doubt whether the Court of Bankruptcy or a Commissioner had power to protect from arrest in respect of this rate. The rate was not proveable under the bankruptcy at all. If the bankrupt be free from arrest in regard to it, we can see no reason why he should not be free from arrest as to all debts contracted between the bankruptcy and the certificate, and our opinion in the case of *Grace v. Bishop* (a) was that a bankrupt was not so free. Now, Lord Campbell, C. J., draws no distinction between this rate and the two others, and for this reason we think

(a) 11 Exch. 424.



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that the defendants are entitled to a new trial, as we do not think there was an absence of reasonable and probable cause for the arrest for this rate, and we think the jury ought to have been so told.

But the defendants' counsel insisted that the verdict ought to be entered for them upon the leave reserved. It is certainly extremely difficult to see how any action can be maintained for the proceedings which are the subject of the first count. The plaintiff by his own admission owed the three rates; he was adjudicated bankrupt, but had not obtained his certificate; the liability to pay them was therefore as before the bankruptcy; what the defendants did was to summon the plaintiff before the justices, who are the tribunal appointed by the legislature to adjudicate upon the matter, to show what answer he had to payment of the rate being enforced; he did not appear upon the summons at all, and what took place before the justices was not proved at the trial. It is highly probable that they were informed of the bankruptcy, for the matter connected with it was written on the summons which had been returned to Moody, and for anything that appeared the justices thought that the bankruptcy and protection were no answer to the rate, and advisedly issued the distress warrant, and afterwards the warrant for the arrest. Now, unless the arrest under the warrant was itself a trespass, we very much doubt whether there be any cause of action at all. All that the defendants did was to summon the plaintiff before the justices, who by law had jurisdiction upon the matter, and (upon the plaintiff's not appearing) to obtain their decision against him, and the warrant which they delivered to the constable to whom it was directed. There is no evidence that they concealed anything from the justices, or did other than state the whole truth. And we are not aware of any case or authority deciding that persons so conducting them-

selves do anything unlawful, and subject themselves to an action. The justices may have thought that the bankruptcy before certificate had no operation upon the demand for the poor rates, and it seems to us that it cannot be said that the defendants, who were certainly not "creditors" of the plaintiff in the ordinary acceptation of the word, acted without reasonable and probable cause in supposing that the protection of the plaintiffs did not avail against the warrant. We decline to express an opinion that it did not, but we certainly think the point by no means clear.

We have all carefully read the evidence at the trial, and we cannot find any evidence of malice in the defendants; so far as we can judge they seem to have acted *bonâ fide*, and with the honest intention of enforcing payment of the rate or punishing the plaintiff by a month's imprisonment for his default.

As to the count in trespass, the case of *Yearsley v. Heane* (a) is a direct authority that it is not maintainable. We therefore think that the rule ought to be absolute for entering a verdict for the defendants.

Rule absolute to enter a verdict  
for the defendants.

(a) 14 M. & W. 322.

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## IN RE ARTHUR PALMER.

A. P., on the marriage of his daughter I. B., covenanted to pay to the trustees of the settlement then made, as a provision for his daughter on her marriage, 2000*l*. The trusts were to pay the income to I. B. for life, and after her death to her husband for life, and after the decease of the survivor to the children, and if there should be no child then to such person as she should appoint, and in default of appointment then to her next of kin; and in the same settlement he covenanted that his execu-

tors should pay the further sum of 2000*l*. to the trustees, to be held upon the same trusts, within six months after his decease. On the marriage of his daughter, E. B., he covenanted to pay to the trustees of the settlement then made 2000*l*. within one month after the marriage. The trusts of this sum were to pay the income to G. B., the husband of E. B., for his life, and after his death to E. B. for her life, and after the death of the survivor to the children, and if there should be no child then to such person as E. B. should appoint, and in default of appointment to her next of kin. By his will the testator directed "that the covenants on his part contained in the settlements made on the marriage of his daughters, for the payment of monies and annuities for the benefit of themselves and their respective children and grandchildren as therein stated, should be performed;" and proceeded as follows:—"In addition to the property settled by my daughter I. B.'s marriage settlement, I give the further sum of 8000*l*. to the trustees, &c., to be held, &c., upon the same trusts in all respects, for the benefit of my daughter I. B. and her children, as thereby declared as to the property thereby settled; and in addition to the property settled by my daughter E. B.'s marriage settlement, I give the further sum of 8000*l*. to the trustees of such settlement, to be held upon the same trusts in all respects, for the benefit of my daughter E. B. and her children and grandchildren, as thereby declared as to the property thereby settled.—*Held*, that the words "to be held, &c., upon the same trusts in all respects for the benefit of my daughter and her children and grandchildren, as thereby declared as to the property thereby settled," were to be construed as words of reference, incorporating the trusts of the settlements in the will; that the trusts for the husbands were not excluded, and therefore that legacy duty was payable upon that principle.

*PIGOTT*, Serjt., for the Attorney General, had obtained a rule under the 42 Geo. 3, c. 99, s. 2, calling on A. H. Palmer, E. Harley and E. Harley the younger, executors of Arthur Palmer, to shew cause why they should not deliver to the Commissioners of Inland Revenue, an account, upon oath, of all the legacies, and of the property of the said A. Palmer deceased, respectively, paid or to be paid, or administered by the said A. H. Palmer, E. Harley, and E. Harley the younger, as such executors, and why the duties have not been paid, or should not forthwith be paid, according to law.

The rule had been obtained upon an affidavit of a clerk in the legacy duty office that the duties had not been paid.

The following facts appeared from the affidavit of the executors filed in reply—Arthur Palmer, by his will, directed, "that the covenants on his part contained in the settlements made on the respective marriages of his daughters, Isabella Bruce, Elizabeth Blake, and M. A. Harley,

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and of his daughter Julia George, deceased, for the payment of monies and annuities for the benefit of themselves, and their respective children and grandchildren, as therein stated, should be performed according to such respective covenants:” The will then proceeds in these words,—

“And in addition to the property settled by my daughter Isabella Bruce’s marriage settlement, I give and bequeath the further sum of 8000*l.* to the trustees of such settlement, to be held and disposed of by them upon the same trusts in all respects, for the benefit of my said daughter Isabella and her children and grandchildren, as thereby declared as to the property thereby settled: and also in addition to the property settled by my daughter Elizabeth Blake’s marriage settlement, I give and bequeath the like further sum of 8000*l.* to the trustees of such settlement, to be held and disposed of by them upon the same trusts in all respects, for the benefit of my said daughter Elizabeth Blake and her children and grandchildren, as thereby declared as to the property thereby settled: and likewise, in addition to the property settled by my daughter M. A. Harley’s marriage settlement, I give and bequeath the like further sum of 8000*l.* to the trustees of such settlement, to be held and disposed of by them upon the same trusts in all respects, for the benefit of my said daughter M. A. Harley and her children and grandchildren, as thereby declared as to the property thereby settled.” The testator then directed, “that all the legacies and bequests given by that his will, to or for the benefit of or in trust for his sons and daughters and his grandchildren should be paid free of legacy duty.” And he bequeathed the residue of his property, not thereinbefore disposed of in the following words:—

“And all the rest and residue of my estate and effects I give, devise and bequeath to my said daughter Isabella Bruce and my said son A. H. Palmer, equally between

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them, share and share alike, the share of my said daughter Isabella Bruce to be for her separate use in all respects, independent of her husband, and her receipts for the same, and every part thereof, to be the only good discharge for the same."

The settlement, on the marriage of Isabella Bruce, contained a covenant by the testator to pay to the trustees, "as a provision for his said daughter" on her marriage, 2000*l*., which sum the testator paid in his lifetime. The trusts of the settlement were, that the trustees should pay the interest into the hands of Isabella Bruce, for life, for her sole use for her life; and after the decease of Isabella Bruce, then upon trust to pay the interest to Robert Bruce during his life; and after the decease of the survivor, upon trusts for the children, grandchildren, and other issue of the then intended marriage; and if there should be no child who should take a vested interest, in trust for such persons as she should appoint, and in default thereof, in trust for the next of kin of Isabella Bruce; and in the same settlement the testator covenanted that, within six months after his death, his executors should pay to the trustees a further sum of 2000*l*., to be held on the same trusts as the former sum of 2000*l*.

The settlement which was executed on the marriage of the testator's daughter Elizabeth Blake, contains a covenant for payment of 2000*l*. to the trustees, which sum the testator paid in his lifetime. The trustees of this settlement were to pay the interest to George Blake during his life, and after the decease of George Blake, to pay the interest to Elizabeth Blake for her life, and after the decease of the survivor, in trust for the children; if no children, then to Elizabeth Blake absolutely, or as she should appoint, and in default of appointment, to her next of kin.

The settlement on the marriage of the testator's daughter

Mary Ann Harley, was similar to that of Isabella Bruce, except that the testator did not covenant that his executors should pay a second sum of 2000*l.* after his death to the trustees.

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An account of the estate of the deceased had been rendered by the executors to the Commissioners of Inland Revenue, and all the duties had been paid, except upon the three sums of 8000*l.* each, given in addition to the property settled on Isabella Bruce, Elizabeth Blake, and Mary Ann Harley. The executors offered to pay the duty of 1*l.* per cent., as on an absolute gift to the testator's daughters. The Commissioners claimed the duty as upon annuities for the lives of the testator's daughters respectively, on the ground that other persons chargeable in a different rate of duty might thereafter become entitled to the income of the several sums of 8000*l.*

*Bovill* now shewed cause.—By the gift of this money, upon the trusts of the settlement, “for the benefit of the daughters and their children,” the husbands are expressly excluded. They therefore take no interest under the will. The rule is, that no one who is not named shall take an interest under a will. It is not sufficient to shew what was probably the testator's intention, if he has omitted to declare it: *Stubbs v. Sargon* (a); 1 *Jarman on Wills*, 2nd edition, p. 460. It is clear that the existence of the husbands was a fact present to the mind of the testator, because he expressly refers to the marriages and the settlements. Now, if he had intended to give an interest to them, he would have said “upon the same trusts as were declared in the settlements” concerning the several sums of 2000*l.* [*The Attorney General*.—He gives “in addition to the property

(a) 2 *Keen*, 255; 3 *Myl. & Cr.* 507.

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settled.”] Those words are intended to exclude any notion that the gift was to be a substitution for the original fund.

*The Attorney General, Beavan, and Thring*, in support of the rule.—The argument on the other side proceeds upon this fallacy, that by the words “upon the same trusts in all respects for the benefit of my daughter, her children and grandchildren, as are thereby declared as to the property settled,” (which are words of reference), the testator intended to enumerate all the trusts; whereas the testator only meant to describe the settlement to which he meant to make an addition. There are many instances of the application of the rule, that where there is a general bequest of the testator’s estate to trustees, followed by a particular application of part, the words directing the application shall not be extended. *Stubbs v. Sargon* (a) is merely a modified application of that rule. There was in that case a bequest of the whole of the testator’s estate, and a gift of the beneficial interest in terms applicable to real estate only, and there was real estate to satisfy the words of description. There was therefore nothing on which the Court could found a decision that the word “hereditaments” extended to the furniture and effects. Here, if the construction contended for by the executors be adopted, it would be contrary to the intention of the testator as expressed in every other part of the will. As to the bequest to Mrs. Blake, it would not become an addition till after the death of her husband; therefore it must be supposed that the testator intended either to die intestate as to the income during Mr. Blake’s life, or that such income should fall into the residuary estate. A benefit to the husband is a

(a) 2 Keen, 255; 3 Myl. & Cr. 507.

benefit to the wife; a benefit to the father is a benefit to the children. The gift, may therefore, properly as well as popularly, be described as for the benefit of the wives and children. The only real argument against the construction contended for is, that the words for the benefit of my daughter and her children would be surplusage, unless they are construed as limiting the trusts. But in the settlement there is an ultimate trust for the benefit of the next of kin of the daughter. The testator may have meant these sums to go, not to the next of kin of the daughters, but to his own residuary legatees, after the deaths of the daughters and their husbands, if there were no children. The ordinary rule is to incorporate matters referred to by words of reference in a will. Here the plain intent was to make an addition to existing settlements referred to. The whole settlements are therefore imported into the will, and unless this is done, it is impossible to give full effect to the language of the will.

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POLLOCK, C. B.—I am of opinion that this rule must be absolute. The question is, whether the words, “to be held and disposed of by them upon the same trusts in all respects for the benefit of my daughter and her children and grandchildren, as thereby declared as to the property thereby settled,” are words of reference only, or whether their operation is to create different trusts from those in the settlement. I am of opinion that they are merely words of reference, and that the trusts upon which the trustees take the several sums of 8000*l.* do not vary from those in the settlement. The language admits of no doubt; it is only by an ingenious construction that any doubt has been suggested. The testator, “in addition to the property settled,” gives “the further sum of 8000*l.* to the trustees of



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the settlement," and it is to be held "upon the same trusts in all respects," and "for the benefit of my daughter." The word benefit is not a technical word, but a general expression. The gift, therefore, may well be read: Whereas certain monies were settled by means of trustees for the benefit of my daughter and her children: I give an additional sum of 8000*l.* upon the same trusts in all respects. The settlement was in effect for the benefit of the wife and children. The Attorney General has pointed out one mode in which the will may be construed so as to give effect to these words, and shew that they are not without meaning.

BRAMWELL, B.—The words "for the benefit of my daughter and her children" are not terms of art; they may be satisfied by giving an interest to the daughter, the husband and the children. These words *may* have the meaning which the Crown attributes to them, or that which Mr. *Bovill* suggests. There are, however, expressions in the will which strongly favour the interpretation put upon them by the Crown; for instance, the gift is, "in addition to the property thereby settled," and is to be held "in all respects upon the same trusts." But assuming that the Attorney General's construction of the words in question is not the true one, if Mr. *Bovill* is right, why should not the words be "upon such of the trusts as are for the benefit of my daughter and her children?" Moreover, the testator has in his will actually put an interpretation on this very phrase. He directs that the covenant on his part contained in the settlements on the respective marriages of his daughters "for the payment of monies and annuities for the benefit of themselves and their respective children and grandchildren"

shall be performed. This consideration leads me to doubt whether the next of kin of the wife are not intended to take after the death of the husband and wife without children, to the exclusion of the residuary legatees under this will.

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WATSON, B.—Each settlement was originally for the benefit of the wife and children; and the question is, whether the true construction of this bequest is that the money is to be on the same trusts, down to the grandchildren. If the testator intended that this money should be held upon different trusts there is no allusion to such intention. Then if *Mr. Bovill's* construction is to prevail, what is to become of the dividends during the lives of the husbands? It is suggested that they would either go into the residue, or that, the life interest of the husband being struck out, the wives would take immediately. In the latter case *Mrs. Blake's* husband would immediately get the control of the property bequeathed to her. The sound construction appears to be to treat the words as being merely words of reference.

CHANNELL, B., concurred.

Rule absolute.

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Feb. 25.

## IRVING and Another v. GRAY, HUTTON and Others.

A deed of arrangement, under the 224th section of "The Bankrupt Law Consolidation

**ACTION** for money had and received by the defendants to the use of the plaintiff, and for money due on accounts stated.

Act, 1849," must provide for the distribution of *all* the debtor's estate and effects, and amongst *all* his creditors. But a deed providing for the distribution of all the debtor's estate amongst all the creditors, who would have been creditors under an adjudication of bankruptcy on the day of the meeting of creditors, treating such creditors as creditors for the sums they would on that day be entitled to prove for in bankruptcy, is not invalid, because: First, it does not contain an express assignment by the debtor of his estate, but only a covenant to assign it when required by the inspectors: Secondly, because it makes no provision for creditors who may have become so between the day of the meeting and the date of the deed, it not appearing that there were any creditors who became so between those times: Thirdly, because it contains a letter of licence which is absolute and not conditional: Fourthly, because it does not contain a provision rendering it absolutely void if the debtor does not perform the covenants contained in it.

A deed of arrangement under the 224th section is not invalidated by reason of its containing the following provisions.—First: A power to employ the debtor in winding-up his affairs under the direction of inspectors, and for the debtor to employ persons under him with the sanction of the inspectors, and to pay these persons such reasonable remuneration as the inspectors shall think fit. Secondly: An authority to the inspectors to make advances to the debtor, in respect of any mercantile operations which may have been undertaken by the debtor. Thirdly: A provision for the payment of the costs and expenses of and attending the preparation of the deed and perusal thereof, and the management of the debtors' affairs between the meeting of the creditors and the execution of the deed, or relating, or preparatory to the meeting of creditors, and incident thereto, and to the investigation of affairs since the debtor stopped payment. Fourthly: a discretionary power in the inspectors to retain the dividend which would be payable to a creditor, who at the declaration of the dividend, had not acceded to the deed, such creditor being at liberty to prove, so as to have a dividend out of existing or future funds, but so as not to disturb the former dividend. Fifthly: A power, in case the debtor should commit an act of bankruptcy, for the inspectors to retain 500*l.* for a certain period, as an indemnity against losses, costs, and expenses. Sixthly: A power to the inspectors to avoid the deed in certain events, at the expiration of three months from its date, excepting from the avoidance all acts, proceedings, conveyances, assignments, assurances, matters and things done under and by virtue of it; there being also a power to the inspectors, at any time after the date of the deed, to grant a certificate of conformity, as in bankruptcy, to all or either of several debtors. *Seem*, that the avoidance of the deed, under the provision in question, would avoid the effect of such a certificate if previously granted to any such debtor.

In order to prove a deed of arrangement, the defendants produced from the Court of Bankruptcy a certificate of the inspectors, filed there in conformity with the 226th section of the Bankrupt Law Consolidation Act, 1849, and an account and affidavit of the defendant in conformity with the 227th section. The account included the debts and names of the creditors mentioned in the schedule to the deed. The certificate and other documents were not filed until after action brought. The defendants also proved that the deed was, for some time before the commencement of the action, in the same state as to the execution thereof by the several parties as when produced at the trial, with the exception of two creditors, without whom 6-7ths in number and value appeared to have executed.—*Held*, sufficient evidence of the due execution of the deed.

Plea by defendant Hutton—That the debt and claim in the declaration mentioned became due from the defendants to the plaintiffs after the passing and coming into operation of “The Bankrupt Law Consolidation Act, 1849,” and before the suspension of payment by the defendants, or the making of the deed hereinafter mentioned; and that for six calendar months next before and at the time of the said suspension of payment, the defendants were traders in copartnership, liable to become bankrupt according to the provisions of the said Act; and that at the time of the said suspension of payment, and until and at the time of the making of the said deed, the defendants were, as such traders, indebted to the plaintiffs, and to the parties to the said deed of the third part, in divers sums which they were unable to pay in full, and thereupon and in consequence thereof the defendants suspended payment; and that afterwards a certain deed of arrangement was made and entered into between the defendants of the first part, John Halliday, John Jones, and Theodor Trier of the second part, and the several other persons whose names and seals were thereunto subscribed and affixed, being respectively creditors of the defendants of the third part; and that the said deed was and is such a deed touching the liabilities of the defendants as such traders as aforesaid and their release therefrom, and the distribution, inspection, conduct, management and mode of winding-up of their estate, and all matters having reference thereto, as by the said Act is required and mentioned in order to make the same, when signed by or on behalf of 6-7ths in number and value of the creditors whose debts amounted to 10*l*. and upwards, as effectual and obligatory in all respects, upon all creditors who should not sign or execute the same as if they had duly signed the same (subject to the conditions in the said Act mentioned

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in that behalf): and that the said deed contained all such things and provisions as were necessary to make the same such a deed of arrangement as aforesaid.—Averments: that the said deed was, before the commencement of this suit, signed and executed by or on behalf of 6-7ths and upwards in number and value of those creditors of the defendants whose debts amounted to 10*l*. and upwards, to wit, by 9-10ths of such creditors; and that after the suspension of payment of the defendants as such traders as aforesaid, and more than three calendar months before the commencement of this suit, the plaintiffs had such notice from the defendants of their said suspension of payment, and of the said deed of arrangement, as by the said Act is required; and that, before the commencement of this suit, all other things have been done and have taken place necessary to make the said deed as effectual and obligatory on the plaintiffs (they not having signed the same), as if they had duly signed the same.

Plea by the other defendants.—That before and at the time of making the indenture hereinafter mentioned, and for six calendar months and upwards before the suspension of payment by the defendants, the defendants carried on business and were traders, liable to become bankrupts under the bankrupt laws, and within the meaning of the statute; and that before and at the time of the making of the said indenture, the defendants were indebted to the parties thereto of the third part respectively, and to divers other persons, in divers sums of money, which the defendants were then unable to pay in full; and that after the accruing of the causes of action in the declaration, and after the passing of The Bankrupt Law Consolidation Act, 1849, and before the making of the said indenture, the defendants suspended payment, and afterwards, by a certain deed of arrangement made between the defendants of the first part, John Halliday &c.

of the second part, and the several other persons whose names and seals or respective copartnership firms should be thereunto subscribed and affixed by themselves, or their respective partner or partners, agent or agents, being respectively creditors of the said defendants of the third part, being a deed of inspection and arrangement between the defendants and their creditors, within the true intent and meaning of the clauses of The Bankrupt Law Consolidation Act, 1849, relating to arrangements by deed, it was, among other things, agreed and provided, that the estate of the defendants should be wound up and distributed agreeably to the provisions of the said statute, in manner provided by the said indenture.—(The plea then set out the letter of licence, *post*, p. 44):—that before the commencement of this suit, to wit, at the time of the making of the said indenture, the same was duly signed, sealed and delivered by the defendants and divers of their said creditors, and that the said indenture, at the time of making thereof, and at all times, was and is an arrangement by deed and a deed of arrangement between the defendants and their creditors, within the meaning of the provisions of the said Act with respect to arrangements by deed; and that the said indenture was, before this suit, duly signed, sealed and delivered, by and on behalf of 6-7ths in number and value of the creditors of the defendants, within the meaning of the said provisions, whose debts amounted to 10*L*. and upwards, accounting every creditor as a creditor in value in the mode pointed out by the said statute: that the plaintiffs were, at the time of the making of the said deed, creditors of the defendants in respect of the causes of action in the declaration mentioned, within the meaning of the provisions of the said Act, and that the debts in the declaration mentioned then were debts due from the defendants to the plaintiffs within the meaning of the said indenture, and debts in respect of

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which the plaintiffs were entitled to receive a dividend, according to the provisions of the said deed; and that after the said suspension of payment by the defendants, and after the making of the said indenture, the plaintiffs had due notice of the said suspension of payment by the defendants, and of the said deed of arrangement, and were then requested to sign and execute the same, and the plaintiffs then might and could, if they would, have signed and executed the same as parties thereto of the third part: that three calendar months from the time when the plaintiffs had such notice of the defendants' suspension of payment, and of the said deed, expired before the commencement of this suit, and that before the commencement of this suit all things had happened, and all times had elapsed necessary to render the said deed obligatory on the plaintiffs, and to entitle the said defendants to plead the same as an answer to this action: that by reason of the premises, and by force of the statute, the said deed (the same having been at all times, on the making and executing the same, and being still in force,) became, and was and is as effectual and obligatory in all respects on the plaintiffs, as if they had duly signed and executed the same, and that the period during which the liberty and licence aforesaid was given to the defendants, is not yet expired, and by reason of the premises the defendants, before the commencement of this suit, became and were released and discharged, in manner aforesaid, from the said causes of action in the declaration mentioned.

At the trial before *Pollock*, C. B., at the London sittings after Trinity Term, 1857, it was proved that the defendants, who were colonial brokers, suspended payment in September 1856, and that notice of their suspension of payment was sent to the plaintiffs by letter dated the 3rd of October; that a meeting of the creditors of the defendants was convened

by a circular sent to the plaintiffs and the other creditors of the defendants, and that in accordance with such notice, a meeting of creditors was held on the 12th of November, and that the defendants wrote to the plaintiffs on the 26th of December, giving them notice of the contents of the deed. An indenture dated the 16th of December 1856 was then put in. It was made between the defendants of the first part, John Halliday, John Jones and Theodor Trier of the second part, and the several other persons whose names and seals or respective copartnership firms were thereunto subscribed and affixed by themselves or their respective partner or partners, agent or agents, being respectively creditors of the defendants, of the third part. After reciting that the defendants (therein designated as "The Debtors") had carried on the business of merchants in copartnership, and in the course of the said trade had become indebted to the parties thereto of the third part, either alone or in conjunction with their partners, which debts the debtors were then unable to discharge, and that a meeting of creditors was held on the 12th of November, 1856, at which it was resolved that the affairs of the defendants should be administered by them, or such of them as the inspectors thereafter mentioned should appoint, under the inspection of the said John Halliday, John Jones and Theodor Trier, under whose advice the assets should be realized and distributed as quickly as could conveniently be done, and that Halliday, Jones and Trier, and the survivors or survivor, or the inspectors or inspector for the time being of those presents, should have such powers as were thereafter given, and that the several parties should enter into the covenants thereafter contained: also reciting that the parties of the second part had agreed to act as inspectors, and the debtors had assented to the resolutions of the creditors, it proceeded as follows:—

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1. Covenant with inspectors to render account of real and personal estate in one month and from time to time.

2. Books to be delivered up to inspectors.

3. To collect the estate (a).

NOW THIS INDENTURE WITNESSETH: that in pursuance of the said resolutions, &c., and in consideration of the premises and the mutual covenants and provisions hereinafter contained, It is hereby covenanted, declared and agreed, by and between the said parties to these presents, as follows: (that is to say): They the said debtors do each of them separately for himself, his heirs, executors and administrators, and so far as relates to himself and his own acts and deeds only, and not further or otherwise, hereby covenant, &c., with the said inspectors and the survivor of them, his executors and administrators, in manner following: That the debtors will, within one calendar month after the day of the date of these presents, and also from time to time thereafter as often as thereunto required by the inspectors, &c., or their or his assigns, or other the inspectors or inspector for the time being, acting under or by virtue of these presents, make out and state in writing, or otherwise complete as accurately as may be practicable, and deliver to them or him requiring the same, a true account of all the real and personal estate and effects, rights and credits of them the said debtors, or any or either of them, with all such particulars as may be sufficient to enable the inspectors, &c., to ascertain the actual state of the same, and also a true account of all their or any or either of their debts, liabilities and engagements, and that the books, papers, accounts and documents in anywise relating to the dealings and transactions, estate and effects of the said debtors, or any or either of them, shall, at all times hereafter, be open to the inspection of the said inspectors, &c., and shall, upon demand, be delivered up to the said inspectors, &c.: And that the said debtors will, upon the request and direction, and under the inspection and control of the said inspectors, &c., and for such period as they or he shall require, collect

(a) *Post*, p. 85.

and get in and convert into money the said estate and effects as well in Great Britain as elsewhere, and for that purpose, and upon reasonable notice being given to them or him by the said inspectors, &c., will proceed to any place or places whatsoever in the United Kingdom, and stay there so long as may be required by the inspectors, &c.: And further, that the debtors, or any of them, will not, by proceedings in bankruptcy, insolvency or otherwise, attempt to withdraw themselves or any of them or their estate from the engagements in these presents contained, or in anywise frustrate the arrangements intended to be hereby carried into effect, and shall not, without the approbation of the said inspectors, &c., release any debt, claim or demand, nor postpone payment, or compromise, submit to arbitration, or otherwise prejudice or affect any debt, claim or demand; nor bring or prosecute or interfere with any action or suit in respect of the same, but upon the request and direction and under the inspection and control of such inspectors or inspector for the time being, the said debtors, or any or either of them under the indemnity of these presents, shall and will from time to time commence and prosecute or resist and defend all actions, suits, attachments, sequestrations, extents, executions or other proceedings at law or in equity relating to the premises; and also upon the like request and direction and under the like inspection and control, submit or consent to the submitting to the arbitration or to the opinion or decision of counsel any difference or question relating to or affecting the said estate. And also upon the like request and direction and in manner aforesaid, enforce or perform any lawful awards, and compromise or compound any debt, claim or demand, whether due to or made by them or any of them on account of the said firm, or due from and against them or any of them on account of the said firm, or accept security for any debts owing to them or give time

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4. Not to frustrate these presents.

5. Nor release debts.

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6. To divide  
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for payment thereof, or refrain to sue. And also upon the like request and direction and in manner aforesaid make any arrangements or adjustments with any of the creditors, parties hereto of the third part, for ascertaining or fixing the amount of their respective debts or claims, or respecting any securities held by them respectively for the same, or the valuation, selling or realizing of such securities; or liquidate and pay the debts or claims thereby secured, and take a transfer of the security, or upon such request and direction and in manner aforesaid, sell, or dispose of any part of the said estate to any creditor or creditors, by way of payment on account of and in part of his, her or their debt, dividends or otherwise. AND ALSO, that the said debtors, subject to and after payment of the costs, charges, and expences of and attending these presents, and of the perusal and approval thereof, and of and incident to the arrangement of their affairs, whether under or by virtue of these presents or prior to the execution thereof, and all other costs, compositions, indemnities, and payments hereinafter mentioned or referred to (a), shall and will from time to time, upon the like request and direction and in manner aforesaid, aid and assist in dividing the money arising from their estate, rateably among their several creditors, being such persons as would or might be creditors under an adjudication of bankruptcy, if, instead of these presents, an adjudication of bankruptcy had been made against the said debtors upon a petition for adjudication of bankruptcy filed on the day of the date of the said meeting of creditors (b), and treating such creditors as creditors for such sums as they might on or subsequent to the 12th day of November, 1856, have proved for under such adjudication, if such had been made, until the said estate shall be exhausted. AND

(a) See rule 9, *post*, p. 51, pp. 77, 86, 93.

(b) See pp. 78, 86, 91.

**FURTHER**, that they the said debtors shall and will also from time to time, when and as received and if received by them, deposit the monies and securities for money which shall constitute or be produced from their said estate, in such bank or banks or otherwise as the said inspectors or inspector for the time being may from time to time direct, to the credit of an account to be kept in respect of this estate, in such names or name as the said inspectors or inspector for the time being from time to time shall direct or sanction; and such account may from time to time be altered and transferred to and kept in the names or name of the said inspectors or inspector for the time being, or of such other persons or person, and to be payable upon such cheques or orders or otherwise as the said inspectors or inspector for the time being may from time to time direct; and the said debtors shall not nor will, nor shall nor will any of them, afterwards draw out any part of such monies, except with the consent of the said inspectors or inspector for the time being, nor with such consent except only for the purpose of the same being applied as in these presents mentioned, or as such inspectors or inspector for the time being shall for the time being direct; and shall not nor will engage in any other business so as to incur any new debt, or enter into any new contract so as to dispose of, prejudice or affect any part of the said estate, except with the previous consent of the same inspectors or inspector for the time being. And also, that they, the said debtors or one of them, shall and will from time to time upon the like request and direction, and under the like inspection and control of the said inspectors or inspector for the time being, keep proper books of account of all receipts, payments and transactions relating to the said estate, and at all times when required so to do, make out correct and proper accounts and balance sheets of or shewing the business and affairs of the said

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7. To deposit  
monies as  
inspectors  
may direct.

8. To keep  
proper books  
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9. Letter of  
licence from  
creditors (a).

estate ; and also furnish true and correct copies thereof to the said inspectors or inspector for the time being, and particularly shall and will once in every month make out accounts of all cash transactions relating to their said estate, and, if required so to do, deliver to them or him correct copies thereof, and shall and will preserve for and deliver to them or him all letters written to and copies of letters written by the said debtors or any of them, and all documents and papers concerning the said estate ; and at all times produce and shew to them or him all such books of account, accounts, letters, documents and papers, and the several vouchers referring thereto, and give all information and assistance in the power of the said debtors or any of them, both towards the full understanding thereof and the general conduct of their affairs. AND FURTHER shall and will observe, perform, fulfil and keep all and every the agreements, declarations, provisions, stipulations and restrictions hereinafter contained and generally expressed or made applicable, so far as the same or any of them ought to be or are or is capable of being observed, performed, fulfilled and kept by them or any of them. And shall and will wholly wind up their affairs under the direction, inspection and control of the said inspectors or inspector for the time being. AND THIS INDENTURE FURTHER WITNESSETH, that in consideration of the premises, the several creditors parties hereto of the third part, for themselves respectively, and their respective partners, executors and administrators' acts and deeds only, and so that each sole creditor shall be answerable only for himself, and so that the partners or partner in every partnership, being creditors, shall be jointly answerable only for the acts, deeds and defaults of the same partnership, and the partners or partner therein, do hereby, so far as

(a) *Post*, p. 84.

they lawfully can (but subject nevertheless to the provisions hereinafter contained) give and grant unto the said debtors, so long as these presents shall be in force, and until such debtors shall respectively become released under the provisions hereof, absolute liberty and licence at all times hereafter, upon the request and by the direction of the said inspectors or inspector for the time being, to convert their estate and effects into money, and to wind up all their affairs under the inspection and control of the said parties hereto of the second part, or other the inspectors or inspector for the time being. And do hereby, subject to the provisions herein contained, promise and agree to and with the said debtors, and to and with each of them, his executors and administrators that they the said creditors, or their respective executors, administrators, partners or partner, shall not nor will, during the continuance of the said licence, either at law or in equity, or in bankruptcy or otherwise, arrest, imprison, sue or proceed against the said debtors or any of them, or any of their heirs, executors or administrators, or their or his lands, tenements, goods, chattels, estate or effects for or on account of any debt or demand, in respect of which they, the said respective parties hereto of the third part, shall be entitled to receive a dividend according to the provisions of these presents. And if they the said last named covenantors, or any of them, shall commit a breach of the aforesaid agreement, then the said debtors, and each of them, their and his heirs, executors, administrators and estate, shall be and are, and is hereby released and discharged of and from all such debts, claims and demands, both at law and in equity, now due and owing from or by the said debtors to such of the said creditors respectively by whom a breach of the aforesaid agreement shall be committed, and as well such as are now payable and can be immediately enforced as those payable

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in future or which cannot be immediately enforced. And that in case of such breach, these presents may be pleaded and used in bar and answer to all actions, suits and proceedings in respect thereof, as effectually as if a release to the extent aforesaid had been actually executed by the same creditor or creditors and herein contained. AND FURTHER, it is hereby, either by way of agreement, declaration or proviso, as the case may be or may require, agreed, declared and provided, between and by the said parties hereto, in manner following (that is to say), all of them, or some or one of them, as the case may be, agreeing and declaring as to and for and in respect of the matters to be by them or him, or their or his partners or partner respectively, done or permitted, or assented to, and as to their or his own acts and defaults, and the acts and defaults of their or his partners or partner only, that is to say:—

Estate to be  
administered  
as in bank-  
ruptcy.

1st. That the said partnership estate, with the exception of such allowances and payments of effects or monies to the said debtors respectively as the said inspectors or inspector for the time being may, in their or his discretion, authorize and direct, but not exceeding in quantity or amount the allowances which might have been made to the said debtors out of their estate and effects, under the statutes relating to bankrupts, in case a petition for adjudication of bankruptcy had been filed against them on the 12th day of November, 1856, and they had been thereunder adjudicated bankrupts; and in case the same dividend or dividends should have been paid to creditors under such adjudication as shall be paid by virtue of the provisions hereof, and which allowances and payments, to the quantity and amount aforesaid, or to any less quantity or amount, the said inspectors or inspector for the time being may direct and authorize, shall be administered as nearly as circum-

stances will admit, having regard to the provisions hereof upon the principles and according to the rules and practice of the bankrupt law in England, and as if such petition for adjudication of bankruptcy had been filed, and such adjudication made as aforesaid. PROVIDED ALWAYS, and it is hereby agreed and declared, that the separate estate of each of them the said debtors shall be applied under and pursuant to the provisions of these presents, in or towards payment of the separate debts and liabilities of each of them the said debtors, and the surplus (if any) of the separate estate of each of them the said debtors, after payment of his separate debts and liabilities, shall be applied in aid of the partnership funds, for payment of the partnership debts; and the ultimate surplus (if any) of the separate estate of each of them the said debtors, after such application as aforesaid, shall belong to himself for his own benefit: It being the true intent and meaning of the said parties hereto, that the whole of the joint and separate estates of the said debtors shall be realized, applied and administered under the provisions of these presents, in accordance with the principles of the bankrupt laws of England.

2nd. That it shall be lawful for the said inspectors or inspector for the time being, in their or his discretion, to direct and authorize the said debtors, or any or either of them, to carry on or conduct for the purpose of winding up, and to wind up the said business and the affairs and transactions thereof, and for the purposes aforesaid to manage and realize the estate and assets invested therein or otherwise belonging to them, in such way and manner as the same inspectors or inspector for the time being shall think expedient or desirable; and for all or any of the purposes aforesaid to employ or require the assistance of the said debtors, or any or either of them, in the mode and

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Parties of the  
2nd part to  
wind-up  
business and  
with assistance  
of debtors, if  
required.



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Inspectors to  
employ agents,  
accountants,  
&c.

to the extent the said inspectors or inspector for the time being shall judge proper, with full power to dispense with the services of the said debtors, or any or either of them, either wholly or for a time; and also from time to time to make and pay to them for their services such reasonable remuneration as the said inspectors or inspector for the time being shall think proper (a).

3rd. That the said inspectors or inspector for the time being may, at the expence of the estate, authorize and employ any person or persons to act as their or his solicitors or solicitor, agent or agents, or as the agent or agents of the said debtors, in England or elsewhere, in getting in or realizing any part of the said estate, or in inspecting, controlling, ordering or directing all or any matters relating thereto; and to give effect to such agency or agencies the said debtors or any of them shall, at the request of the said inspectors or inspector for the time being, appoint an attorney or attornies, joint or several, at any place or places either in this country or abroad, but so that such inspectors or inspector for the time being may, as they or he are and is hereby authorized and empowered to do, revoke, change and renew, or direct to be revoked, changed or renewed, every or any such appointment at their or his discretion: and also that the said inspectors or inspector for the time being may employ any accountant, clerks or servants necessary and proper for keeping the accounts and managing and administering the said estate; and every person so employed shall be paid or allowed such salary or compensation out of the said estate as such inspectors or inspector for the time being shall think fit.

Inspectors may  
advance money  
and give bail  
in any action.

4th. That it shall be lawful for the said inspectors or inspector for the time being, in cases where and so often

(a) *Post*, pp. 79, 92.

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as they may think it fit for the interest of the creditors so to do, to make advances out of and on account of the aforesaid estate in furtherance of the objects contemplated in and by these presents, or any of them, on account of any mercantile or other operations which shall have been undertaken by the said debtors, or any or either of them (a). And further, that the said inspectors or inspector for the time being, if they or he shall think it expedient, shall or may, on account and at the risk of the said estate, give or procure or authorize to be given bail for the said debtors, or any of them, to any action or actions or proceedings under the Bankrupt Act in which they or any of them may, during the continuance of the letter of licence herein contained, be arrested or required to give bail or sureties; and that the said inspectors or inspector for the time being shall or may, out of the said trust estate, indemnify themselves and himself, and the persons or person who shall at their or his request become bail for the said debtors or any of them, of and from all costs, damages and expences which they or he shall respectively incur by reason of so becoming bail; and also that in case it shall be deemed expedient or advisable to bring, commence, defend, continue or prosecute any action or actions, suit or suits, or other proceedings at law or in equity or in bankruptcy, already brought or to be brought concerning the same estate, the said inspectors or inspector for the time being shall or may exercise their or his discretion in commencing, defending, continuing or prosecuting, or in discontinuing or compromising the same, and shall and may retain or require payment of all costs, charges, damages and expences in anywise relating thereto out of the monies which shall be received in any respect of such estate.

(a) *Post*, pp. 79, 86, 93.

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To make  
arrangements  
for the sale  
of the said  
estate.

5th. That it shall be lawful for the said inspectors or inspector for the time being to make any arrangement or arrangements for the sale either to the said debtors, or any or either of them, or to any persons or person in trust for them or any of them, or generally to any other person or persons, and either upon a valuation thereof or otherwise of the whole or any part or parts of the said estate, discharged from any covenant herein contained as to the application of such property so to be sold, and to give time for payment of the consideration, or any part thereof, whether by instalments or otherwise, and either with or without security for the same, as such inspectors or inspector for the time being shall think fit.

Power for in-  
spectors to  
discharge bills  
coming due.

6th. That in case there shall be any sum or sums of money owing by or claimable against the said debtors on bills or otherwise which have not yet become payable, and the amount of which would be recoverable by the said debtors against other parties, the said inspectors or inspector for the time being shall or may pay the same sums of money, or a dividend thereon, on being allowed discount or rebate for acceleration of payment or otherwise, in the same manner as if the said sum or sums had been proved or claimed under a petition of adjudication in bankruptcy.

To make  
arrangements  
with parties  
holding goods,  
&c., in pledge.

7th. That it shall be lawful for the said inspectors or inspector for the time being in their or his discretion, by and out of the said estate and the proceeds thereof, to pay in full or effectuate any arrangements which they or he shall deem reasonable and for the benefit of the creditors, with any of the said creditors, or with any other person or persons either holding any goods or property or bills or securities of the said debtors (or in which they are or may be interested) by way of security or pledge for money, or having any claim or demand thereon in any manner by

way of lien, for the purpose of obtaining possession of the same goods, property or securities exonerated and released from such pledge or lien, claims or demands.

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To adjust  
claims with  
debtors and  
creditors.

8th. That it shall be lawful for the said inspectors or inspector for the time being, in their or his discretion, to compound any debt or debts or sums of money owing to the said debtors or any of them, or to accept or take security for part of the same in full thereof, or to give further time for payment of the same debt or debts or sums of money, or to refrain from suing for any debt or debts which shall in their or his opinion be bad or desperate, without being answerable for any part of such debt or debts; and likewise in case of any dispute, doubt and difficulty arising between the said inspectors or inspector for the time being on the one part, and any other person or persons whatsoever respectively being a debtor or debtors, or creditor or creditors, or reputed debtor or debtors, creditor or creditors of the said estate, or of the said debtors parties hereto, or any of them, on the other part, touching any claim or demand whatsoever, and made on behalf of or against the said estate, or the said debtors or any of them, it shall be lawful for the said inspectors or inspector for the time being at their or his discretion, to adjust and settle all or any of such claims and demands in such manner as to them or him shall seem most to the advantage of such estate, or, if need be, to refer any matter so in dispute to arbitration.

9th. That until such full payment and satisfaction or release as hereinafter mentioned, all the monies and proceeds to arise from the said estate and effects shall be applied in the following order (that is to say)—1st, in paying all costs, charges and expences incurred or to be incurred in or relating or preparatory to the said meeting

Monies to arise  
to be applied  
in payment  
of :—  
1st. Costs.  
2nd. Of al-  
lowances.  
3rd. Of  
money for the  
relinquishment

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of any security  
or compromise  
of debts or  
claims.

4th. Of cre-  
ditors rateably.

of creditors heretofore held, and incident thereto and to the investigation and adjustment of the accounts and transactions of the said debtors since they stopped payment on the 7th day of October, 1856, including the costs of and incident to these presents, and all charges already incurred by the said parties hereto of the 2nd part, or any or either of them, or the said inspectors or inspector for the time being, with reference to the affairs of the said debtors, and in or about the execution of all or any of the duties or powers of these presents, and of all or any matters hereby authorized (a); 2nd, in paying such sum or sums of money as the said inspectors or inspector for the time being shall think fit and proper to be retained by or paid to the said debtors for subsistence as aforesaid; 3rd, in paying any sum or sums hereby authorized to be paid for the relinquishment of any security or securities, or in payment or compromise of any debts or claims under the authority of these presents, and in payment of any rent for or in respect of which the estate and effects of the said debtors could be distrained, and any wages or salaries which, under the provisions of The Bankrupt Law Consolidation Act, 1849, would have been payable in full under an adjudication of bankruptcy; 4th, so far as the same will extend in or towards paying rateably and without preference or priority (otherwise than as aforesaid) to the persons for the time being entitled to receive the same respectively, at such time and times and in such manner as the said inspectors or inspector for the time being shall direct, the several and respective debts which shall for the time being remain due and owing from the said debtors to the creditors parties to these presents, or other the creditors who are or may be entitled to participate in the provisions

(a) *Post*, pp. 77, 94.

or benefits thereof, and in the proportions in which such creditors respectively may be entitled so to participate.

10th. That such dividends shall (subject as before and hereinafter expressed) be made and paid to the creditors at such respective dates and as often as the said inspectors or inspector for the time being shall determine, or be of opinion that a sum of money convenient to be divided shall have arisen from the estate.

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Dividends to  
be declared.

11th. That it shall be lawful for the said inspectors or inspector for the time being to lay out and invest, or direct to be laid out and invested, in their or his names or name or otherwise as they or he may judge fit, any monies not immediately required for the purpose of making a dividend or otherwise, in the purchase of any of the parliamentary stocks or public funds of Great Britain, or of Exchequer Bills, or by way of deposit with any banking or other company, with full power for the said inspectors or inspector for the time being from time to time to alter, vary, or dispose of the said stocks, funds, or securities as they or he may think proper.

Investment of  
monies by  
inspectors.

12th. That in case any surplus shall ultimately remain of the said estate, after full payment and satisfaction of all the costs, charges, and expences, debts, claims, and demands and sums of money hereby authorized to be paid or otherwise provided for, the same shall belong to the said debtors.

Surplus to  
debtors.

13th. That each of the said creditors, before he or she or his or her partner or partners shall become entitled to any dividend or dividends, shall, if required by the said inspectors or inspector for the time being, deliver to them or him a statement in writing signed by such creditors respectively of his or her debt or claim, or the debt or claim of the firm in which he or she may be a partner, with all the particulars usual in a proof in bankruptcy, com-

Creditors to  
deliver state-  
ment in writing  
of their debts.

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prising every satisfaction and security for the same, or any part thereof, and shall, if required by the said inspectors or inspector for the time being, verify such debt or claim by his or her solemn declaration under the act of parliament in that behalf (as well with respect to the consideration as to the amount of the same). But neither any such declaration nor the execution by him or her of these presents shall be conclusive evidence of the validity or amount of such debt or claim ; but the said inspectors or inspector for the time being may litigate or dispute the same if they or he shall think proper ; and thereafter, whenever required by the said inspectors or inspector for the time being, such statement and verification shall be renewed and continued, with all receipts, payments, matters and things which in bankruptcy would affect the debt or claim, or the dividend thereon, before such respective creditor, or his or her partner or partners, shall be entitled to any further dividend ; and any person or persons fraudulently making a false claim, or otherwise wilfully acting contrary to this article, shall be subject to all costs, charges, damages and expences relating to any investigation arising therefrom, and such costs, charges, damages and expences may be retained out of any dividend to which he or she, or his or her partner or partners, may be entitled, or shall be otherwise recoverable by the said inspectors or inspector for the time being.

Original or  
ultimate  
holders of bills  
may be ad-  
mitted to be  
parties to and  
execute these  
presents.

14th. AND WHEREAS persons may have received from the debtors bills of exchange drawn, accepted, or indorsed by or on behalf of them, and such bills of exchange may have been negotiated by such persons so receiving the same, and may now be in the hands of third parties. Now IT IS HEREBY AGREED AND DECLARED, that both or either of such respective parties, namely the original holders or recipients of such several bills and the present or ultimate holders thereof, may be admitted to be parties to and

execute these presents, without such act being an admission that they respectively are or will become creditors. But whichever of such respective parties to each such bill transaction shall ultimately become the real holder thereof for value and the creditor on this estate in respect thereof, shall (as the event shall turn out) be considered and be the creditor, and as such the party to these presents in respect of such bill, and in that case the signature and execution thereof by the other of such parties in respect of such bill shall be considered only as evidence of his or her consent to such holder of the same bill having or deriving the benefit of these presents in respect thereof; but the same shall be without prejudice to his or her execution hereof in respect of any other debt or claim which he or she may have against the estate beyond or other than such bill or several bills; and generally any person or persons who may claim to be, or may anticipate or expect to become a creditor or claimant, creditors or claimants, whether presently or by the ultimate nonpayment or failure or deficiency of any bill, or negotiable or other security, which he, she, or they may hold, or upon the adjustment of any difference or unsettled account, or by any other event, may execute these presents without such execution being an admission of his, her or their being, or being reputed or expected to be or become a creditor or claimant, creditors or claimants, save in so far as he, she or they may be ultimately found to be such creditor or claimant, creditors or claimants.

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15th. AND WHEREAS some one or more of the creditors of the said debtors who may be desirous of executing or concurring in these presents may be prevented from so doing by reason of the want of consent by other parties liable to him, her or them; NOW IT IS HEREBY DECLARED, that it shall be lawful for the said inspectors or inspector

Power for  
 inspectors to  
 secure divi-  
 dends to  
 creditors who  
 may be pre-  
 vented from  
 concurring in  
 these presents,  
 by reason of  
 want of con-



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sent by other  
parties.

for the time being to secure or authorize to be secured to any such creditor or creditors any dividend or dividends which may be declared under these presents, by means of a deposit, upon such arrangement or security for the return thereof as may be approved of by the said inspectors or inspector for the time being; provided that in case such creditor or creditors shall not come in and execute these presents, or a counterpart thereof, within six calendar months from the date hereof, or within such extended time as may from time to time in any of such cases be declared in writing by the said inspectors or inspector for the time being, or in case any such creditor or creditors, or any other person, shall commence or prosecute any action, suit, or other proceeding against the said debtors or any of them, or their or any of their estates or effects in respect of such debt or debts, then and in every such case the monies deposited for securing the dividends shall, within ten days after the expiration of such period, or after the commencement of such proceeding, be returned to the said inspectors or inspector for the time being. Provided also, that in every case of such deposit the creditor or creditors in whose favour the same shall be made shall enter into a covenant or agreement that, in the event of the money so aforesaid not being returned within such period of ten days as aforesaid, the said debtors shall stand released in like manner as if such creditor or creditors had, previously to the same being made, executed these presents; and in such case the said creditor or creditors shall have the benefit of, and be subject to, the several provisions hereof as if he, she, or they had originally executed the same: but such covenant or agreement shall be made subject to such provisions for qualifying or making void the same as may be approved of by the said inspectors or inspector for the time being.

16th. AND WHEREAS some one or more of the creditors of the said debtors may be desirous of concurring in these presents, in the first instance, as to part only of his her or their debt or claim, debts or claims, from fear of prejudicing his her or their claim or demand, claims or demands, in respect of the remainder of such, or of some other debt or claim, debts or claims, against some other person or persons, notwithstanding the provision in that behalf next hereinafter contained: NOW IT IS HEREBY AGREED AND DECLARED, that in such case any creditor or creditors may come in and execute these presents in respect of any portion of his or their debt or demand, debts or demands only, such qualification, and the amount of such last mentioned portion of his or their debt or demand, debts or demands, to be specified opposite to or under his or their name or names subscribed to these presents, and such qualified execution shall not extend to any other portion of his her or their debt or claim, debts or claims, or prejudice his, her or their rights or remedies in respect thereof. But, save so far as any limitation may be so expressed, all creditors executing these presents shall be deemed to be parties in respect of all and the entire debts, claims and demands which they may respectively have against the said debtors or any of them; and in case any creditor shall so execute these presents in respect of part of a debt or alleged debt, nothing in this clause contained shall prevent these presents being obligatory upon him in respect to the residue of his debt as a non-executing creditor, by reason of the provision of The Bankrupt Law Consolidation Act, 1849 with respect to arrangements by deed so far as the same may apply.

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Power for  
creditors to  
execute these  
presents in  
respect of any  
portion of  
their claims.

17th. And it is hereby further agreed and declared, that no creditor shall be prejudiced or affected by being a party to these presents, or by the same being obligatory

Creditors parties hereto not to be prejudiced in respect of their

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claims upon  
other persons  
liable, and

Creditors to  
retire debtors'  
acceptances.

upon him as to his right or remedy against any person other than the said debtors.

18th. And it is further agreed and declared, that all creditors to whom bills or other negotiable instruments may have been given by the said debtors for the debts due to such creditors or any of them, or any part thereof, shall indemnify the said debtors and their estate against all claims or demands by other persons than themselves in respect of such bills or instruments, and all losses, damages and costs by reason or in respect thereof, and shall, if any such bills have been indorsed or transferred to any other persons, take the same up and retire the same before or when they shall become due, and so as to prevent any claim or demand in respect thereof being made upon the said debtors or their estate, and in case of any breach of this covenant the inspectors or inspector for the time being shall have a lien upon any dividend or accruing dividends payable to the creditor or creditors who shall so have broken this covenant in respect of the loss or damage (if any) to be sustained by the debtors or their estate by reason of the refusal or omission to take up or retire such bill or instrument, or to indemnify the debtors and their estate as aforesaid, and may with such dividends, so far as may be necessary, or so far as the same will extend, pay and satisfy such loss or damage when ascertained.

Creditors to  
execute these  
presents with-  
out prejudice  
to any security  
which they  
may hold for  
their debts,  
but security to  
be valued or  
realized.

19th. That in case any creditor or creditors, either solely or jointly with his, her or their partner or partners, shall appear to have or hold any lien or liens, security or securities, on or against the property of the debtors, or any part thereof, in respect of his, her or their debt or demand or any part thereof, the value of such lien or liens, security or securities, may be assessed by and between such creditor or creditors and the inspector or inspectors for the

time being ; and this deed may be executed, and dividends received in respect of the surplus, beyond such assessed value of the debt or demand ; and if the value of the lien or security cannot be agreed on between the creditors and the said inspector or inspectors for the time being, the same shall be determined by arbitration between them (each party appointing an arbitrator), or, if the creditor so desire, the creditor may, with the assent of the said inspectors or inspector for the time being, execute these presents in respect of the whole debt, expressing that such execution is without prejudice to the lien or security, and, in such case, the lien or security may afterwards, within such time as the inspectors or inspector may require, be realized, or the value thereof ascertained by consent or by arbitration as aforesaid, and dividends shall be received only on the surplus of the debt or demand beyond such value so ascertained by realization or otherwise as aforesaid ; provided that no creditor attaching or taking in execution, or who may have attached or taken in execution any part of the estate of the debtors, shall be allowed the benefit of these presents, without bringing such attachment or execution, or the proceeds thereof, into general division, except so far as any such attachment or execution, or the levy or security made or obtained thereby or thereunder, would have been available upon the principle of bankruptcy, under an adjudication on a petition filed as of the 12th day of November, 1856, which attachment, execution or security to that extent, but no further or otherwise, shall remain unprejudiced by the execution hereof. PROVIDED ALSO, and it is hereby further agreed and declared, that the trusts and provisions hereby made for the payment of the several debts as aforesaid are so made upon this express condition, that the several creditors coming in under these presents, and taking the benefit

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of the said trusts and provisions hereby made, shall agree, as they accordingly hereby respectively do, but subject nevertheless to the vacating provisoes hereinafter contained, to accept and take the same and the performance thereof in full satisfaction of their said respective claims and demands, upon and against the said debtors or any of them. Provided also, and it is hereby expressly agreed and declared, that the execution by any creditor or creditors, in accordance with the provisions herein contained, shall not prejudice any liens or securities as aforesaid, and that the execution of these presents by any creditor shall not prejudice his or her claims against any person or persons being a surety or sureties for the debtors. Provided always, and it is expressly declared, that in case any dividend or dividends as aforesaid shall be made before all the creditors of the said debtors shall have executed these presents or otherwise acceded thereto, the said inspectors or inspector for the time being shall be at liberty, if in their or his discretion they or he shall think fit so to do, to retain or direct the retention of a sufficient sum or sums for the purpose of paying like rateable dividends to any creditor or creditors who shall not have so executed or acceded to the same, or the dividends on whose debt shall not have been ascertained, and pay or cause to be paid such dividend to such creditor or creditors, on his or their executing or acceding to these presents, or on the dividend being ascertained, as the case may be, and on his, her or their making and producing such statement or declaration as is hereinbefore mentioned respecting the amount and the justness of such debt or debts or claims, if thereunto required; or in case no such retention shall be made by or by the direction of the said inspectors or inspector for the time being, they or he shall be at liberty, out of the first monies which shall after-

wards come to hand arising from the said estate (after payment of expences), to pay or direct the payment to such creditor or creditors as shall afterwards so execute or accede to these presents, or whose dividend shall be afterwards ascertained, a rateable dividend or dividends on the amount of his, her or their debt or debts, before any further dividend shall be made among the creditors who may have previously executed or acceded to the same; but not so as to disturb any dividend or dividends which may previously have been paid to the other creditors or any of them (a).

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20th. That it shall be lawful for the said inspectors or inspector for the time being from time to time, upon seven days' notice to be given to the known creditors by letter through the Post-office, addressed to their respective places of business or places of abode, or last known places of business or places of abode, or to the agents or last known agents in England of such creditors respectively, to convene at such time and place as they or he shall see fit a general meeting of the creditors of the said debtors parties to these presents, or their agents authorized to act for them or him, so far as they shall be known to such inspectors or inspector for the time being; and that at such meetings or at any adjourned meetings shall be submitted any of the matters by these presents authorized or directed to be determined by a meeting of creditors, and any other matters on which the said inspectors or inspector for the time being may desire to have the advice or direction of the creditors; and the resolutions of the creditors, or the major part in value of them voting at any such meeting upon any matters stated or referred to in the circulars calling the meeting, shall be as binding and effectual upon all the parties hereto,

Power for  
inspectors  
to convene  
meeting.

(a) *Post*, pp. 80, 87, 94.

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Unadminis-  
tered estate to  
be divided pro  
rata among  
creditors.

and their respective representatives and partners, as if all had concurred therein and agreed thereto: nevertheless, any creditor who shall not be present thereat may vote by any note or notes in writing under his hand, declaring his assent to or dissent from any one or more of the matters submitted to the meeting; and such votes may be either absolute (or subject to any condition or qualification expressed in such note or notes), and any absent creditor may by writing under his hand appoint any other person to act for him as his proxy, whose acts shall be considered as the acts of the principal.

21st. That if at any time before the whole of the estate of the debtors shall have been fully administered a dividend or dividends to the amount in the whole of 20s. in the pound shall not have been paid to or realized and provided for all the creditors entitled to the benefit of the provisions hereof, the debtors, every or any of them shall (if the inspectors or inspector for the time being shall require the same) effectually convey, assure and assign all their estate and effects, of which a true account is hereinbefore covenanted to be made out and stated (except such parts as are to be or may be retained by them respectively under the provisions hereof), then remaining outstanding or not divided, to the said inspectors or inspector for the time being, or to such person or persons as they or he may direct; in trust to be administered and divided pro rata among the creditors of the said debtors executing or conforming to these presents, or upon whom the same may become obligatory upon the principles aforesaid, and according to the provisions hereof; and if any ultimate surplus shall remain after full payment and satisfaction of their respective debts or claims, and of all costs, charges and expences hereby authorized to be paid or otherwise provided

for them as to such ultimate surplus, in trust for the said debtors.

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22nd. That in all matters in and by these present provided for and contained, and touching which there are given any powers, authorities and discretions to the said inspectors or inspector, the majority in number of the inspectors for the time being, met or present on any occasion upon which any of such matters may be discussed or brought forward, shall decide and determine, and their decision or determination shall be binding for all purposes as fully as if the whole of the inspectors had joined therein, and all advice, resolutions and acts of the inspectors or inspector for the time being, or a majority of them if more than two, shall be deemed the acts of the whole.

Majority in  
number of  
inspectors to  
decide at any  
meetings.

23rd. PROVIDED ALWAYS, and these presents are upon this condition, and it is hereby expressly agreed and declared, that in case at any time before the said debtors shall become and be discharged under the provisions hereof the said debtors shall commit any act or acts of bankruptcy, or in case a petition for adjudication of bankruptcy shall be filed either on behalf of the said debtors or on behalf of any other person or persons praying that the said debtors may be adjudicated bankrupt, and under which they shall be declared bankrupt, or in case any vesting order of the Court for Relief of Insolvent Debtors, or any order for protection or otherwise under any of the Acts relating to bankrupts or insolvent debtors, or persons unable to meet their engagements with their creditors, shall be made or obtained by or against the said debtors, or in case any other proceedings shall take place which shall prejudice or interfere with the arrangement intended to be made by these presents, or if it shall appear to the inspectors for the time being that the estate cannot be conveniently wound

Indemnity to  
creditors in  
case of bank-  
ruptcy or  
insolvency.



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up or distributed under the provisions of these presents, then the inspectors or inspector for the time being may, by writing under their or his hands or hand, declare these presents to be for the future at an end, and in every such case the covenants hereinbefore contained on the part of the creditors, and every other clause, matter or thing herein contained, so far as the same tend to restrain them respectively from suing for, proving and recovering their several debts, claims or demands, shall cease, determine, and be absolutely void, and they shall thenceforth be respectively at liberty to sue for or go in and be admitted to prove the full amount of their debts, claims and demands now due and owing to or claimed by them respectively, except so far as they may have received the same or any part thereof from other sources than under or by virtue of these presents; and in case any dividends shall have been previously made under these presents, then the creditors who shall have received the same shall, without any liability to refund the same or any part thereof, account for the amount of all such dividends so received by them respectively under these presents, or shall be considered to have received the same as and by way of dividend, and shall be permitted to prove or claim for the balance only of their debts under any petition, insolvency, or other proceedings.

After conveyance or assignment (if it shall take place), or after certificate of estate being fully administered, this deed to operate as a release to parties of the first part.

24th. PROVIDED ALWAYS and it is hereby agreed and declared, that if and when the estate shall have been fully administered according to the provisions hereof to the satisfaction of the said inspectors or inspector for the time being, the said inspectors or inspector for the time being, or the majority of them if more than two, or the survivors or survivor of them, may certify the fact by writing under their or his hands or hand, such writing to be indorsed upon or to refer to these presents, and thereupon and in

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case of such certificate being given (such certificate to be conclusive evidence of the truth of the matters to be therein alleged as aforesaid), or in case of such conveyance, assurance and assignment of all the estate and effects of the debtors being required and made by them respectively, as in a previous article hereinbefore contained, and the same being in like manner certified by the inspectors or inspector for the time being, then and thenceforth these presents shall (except only for the purpose and to the extent in this present clause hereinafter provided for, and without prejudice to the rights of creditors to or over the property so theretofore conveyed or assigned, or to or over any dividends or fund for dividends therein provided but not actually paid to creditors,) operate and be a release and discharge to the said debtors, their heirs, executors, and administrators respectively, or to such one or more of them the said debtors as shall in such certificate be declared entitled to the benefit of this present clause, as fully and effectually and in like manner as a certificate of conformity under a petition for adjudication of bankruptcy as aforesaid would be, and may be pleaded accordingly to all actions, suits, and proceedings in respect of any of the present debts, claims, and demands of all or any of the creditors parties to these presents, in respect of which they shall be entitled to receive such dividends as aforesaid. PROVIDED ALWAYS and it is hereby agreed and declared, that it shall be lawful for the inspectors or inspector for the time being at any time or times, notwithstanding the entire estate of the said debtors shall not have been wound up or administered under these presents (a), to grant a certificate to such one or more of the said debtors as the said inspectors or inspector shall certify in writing under their respective hands to be entitled thereto, and such certificate shall, as regards such

(a) *Post*, pp. 81, 87, 95.

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In case of  
bankruptcy  
creditors to  
prove unsatis-  
fied portion of  
claims.

particular debtor or debtors, operate in all respects as a certificate of conformity under The Bankrupt Law Consolidation Act, 1849, but shall not operate as a release or discharge to any others or other of the said debtors. Provided nevertheless, that in case at any time after such conveyance and assignment the said debtors or any of them shall become or be made or declared bankrupt, and the arrangement hereby made, or the property comprised in any such conveyance or assignment shall thereby be in any way prejudiced or affected, then such release and discharge as aforesaid shall not prevent the creditors respectively, or their respective representatives, partner or partners, from coming in under any such bankruptcy, but they shall respectively be at liberty to prove for so much of their respective debts or claims as may then remain unsatisfied; and so far, if at all, as the same may prejudice or interfere with the rights or privileges of the said creditors under such bankruptcy, but no further or otherwise, such release and discharge shall be void and of none effect.

Receipts of  
inspectors to  
be sufficient  
discharges.

25th. PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts in writing of the said inspectors or inspector for the time being, or of the said debtors or any of them, with the consent of the said inspectors or inspector for the time being, for any sum and sums of money payable to them or any or either of them, under or by virtue of these presents, shall be a sufficient and effectual discharge or discharges for the same respectively, or for so much thereof respectively as in such receipt or receipts respectively shall be expressed or acknowledged to be received. And that the person or persons to whom the same shall be given, his, her or their heirs, executors, administrators or assigns, partners or partner, shall not afterwards be answerable or accountable for any loss, misapplication or nonapplication, or be in anywise obliged or concerned to

see to the application of the money therein mentioned or acknowledged to be received.

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Power to  
appoint other  
inspectors on  
the resignation  
or death of  
those hereby  
appointed.

26th. That in case any or either of the said inspectors parties hereto of the second part, or any future inspector or inspectors to be appointed as hereinafter mentioned, shall renounce or resign the office (which each or any shall be at liberty to do at any time, by writing addressed to the other inspectors or inspector for the time being, and delivered to some or one of them, or if there be no other inspector for the time being, addressed and delivered to any one creditor for the sum of 500*l.* or upwards, or shall depart this life, or permanently go abroad, or become incapable to act in the execution of these presents, or in case it shall at any time be deemed desirable to appoint any additional inspector or inspectors, one or more inspector or inspectors in the place and stead of the inspector or inspectors who should renounce or resign, or depart this life, or permanently go abroad, or become incapable as aforesaid, or by way of additional inspector or inspectors, shall and may be appointed by the inspectors or inspector for the time being, or the executors or administrators of the last of such remaining inspectors, or by a majority in value of the creditors; and in every such case all such (if any) estate and effects as may then have been assigned to and vested in the said inspectors or inspector for the time being, under the provisions hereinbefore contained, shall be conveyed, assigned and transferred so and in such manner that the same may be legally and effectually vested in such new inspector or inspectors jointly with the surviving or continuing inspector or inspectors, if any, or otherwise solely, as the case may require, and all the powers and authorities herein conferred on the inspectors, parties hereto of the second part, shall by virtue of such appointment, be vested in and may be exercised by such newly appointed inspector

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or inspectors, together with the continuing inspector or inspectors, if any, as amply as the inspectors, parties hereto of the second part, are hereby empowered to do; and the like powers as are hereinbefore contained for appointing a new inspector or inspectors shall extend to the case of the renunciation, resignation, death, going abroad as aforesaid, or incapacity of any future inspectors or inspector, and it shall be competent to appoint more than one inspector, although there may be only one vacancy. Provided, that in the meantime and until such new appointment, the surviving or continuing or incompetent inspector or inspectors, or the executors or administrators of the last surviving or continuing inspector, shall have full power to direct and manage the execution of these presents as amply as the said inspectors parties hereto of the second part, and a retiring inspector shall have full power to appoint any inspector or inspectors in his place or stead.

Indemnity to  
inspectors.

27th. That each of the inspectors, parties hereto of the second part, or hereafter to be appointed under these presents, and the said debtors respectively, shall be charged and chargeable only for such monies as they shall respectively actually receive, notwithstanding his or their joining in any receipt or discharge for money, either for conformity or for the satisfaction of the party paying the same; and one shall not be answerable for the other or others, but each only for his own acts and defaults, nor shall they or any of them be answerable for any banker, broker, agent or accountant, clerk, attorney, solicitor, or other person who may be entrusted or employed in the premises in conformity with these presents; nor shall they, or any of them, be answerable for any error in law or fact, or for any loss which may happen to the estate, unless such error or loss shall happen by or through his or their own wilful default. And they and every of them shall, out of any money to arise from the

said estate or effects, pay, reimburse, and indemnify the said inspectors or inspector for the time being from all damages, costs, charges and expences which they or any of them have incurred and may incur in respect of the arrangement hereby made, or otherwise in respect of these presents, or in relation thereto or to the said estate. And in all cases the said debtors shall be indemnified and excused as to all acts, deeds, matters and things done hereunder by the direction or with the consent of the said inspectors or inspector for the time being. And the said inspectors or inspector for the time being may authorize the said debtors or any of them to retain, and may pay to them or any of them all costs, charges and expences they or he may incur by their or his acting in pursuance of the present arrangement.

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28th. PROVIDED ALWAYS, and it is hereby declared and agreed, that in case, at the expiration of three calendar months from the date hereof, there shall be any single creditor or firm whose unsecured debt shall amount to the sum of 50*l*. or upwards, or any two creditors or firms whose unsecured debts shall amount to the sum of 70*l*. or upwards, or any number of creditors the unsecured debts to whom shall in the aggregate amount to 100*l*. or upwards, who shall not have executed or acceded to these presents, then it shall be lawful for, but not imperative upon, the inspector or inspectors for the time being, by writing under their or his hands or hand, to be signed within one calendar month thereafter, and to be indorsed on these presents, to declare void these presents and the covenants and matters herein contained, and thereupon the same shall be wholly void, except as to all acts, proceedings, conveyances, assignments, assurances, matters and things then done under and by virtue of these presents (a), and save as to expences,

These presents  
to be void in  
certain events.

(a) *Post*, pp. 81, 87, 95.

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compensation and indemnities herein provided for, yet so nevertheless that it shall be lawful for the then inspectors or inspector for the time being to have and retain out of the said estate the sum of 500*l*. for the space of six calendar months as a fund for their or his indemnity against any losses, costs, charges or expenses then incurred by them in relation to these presents, but with the obligation at the end of such period to pay the same, or the balance, if any, then remaining in their or his hands or hand, to the person or persons then entitled to receive the same (a).

29th. That the said debtors, or either of them, may at any time hereafter engage or carry on any employment or business on their or his own account, so far as may be consistent with their or his aiding and assisting in getting in and winding up the said estate as aforesaid, and with their and his performance of the several covenants herein contained; nevertheless they shall from time to time, and at all times, whether before or after such certificate or satisfaction shall have been signed as aforesaid, give all such information of or relating to the estate as may be in their power, and render all reasonable assistance in the collection, recovery and winding up of the said estate under the provisions hereof.

To join in all  
necessary acts.

30th. That the said debtors shall and will at all times do and join in doing all acts and matters necessary or reasonable to be required for enabling the inspectors or inspector for the time being to execute the several powers in them hereby reposed, and shall and will ratify and confirm all such acts and matters in carrying out these presents as they shall reasonably do, and shall and will at the request of the said inspector or inspectors for the time being devote all such time and attention as may be neces-

(a) See pp. 81, 94.

sary in and about collecting and getting in and winding up the said estate, or otherwise in and about effectuating the objects and purposes of these presents or any part thereof, and shall not interfere or act in the winding up of the said business, or in any other way connected with the said estate, or the affairs thereof, except so far as they or either of them may be required by the said inspectors or inspector for the time being so to interfere or act.

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31st. And the said debtors do hereby, and each of them doth hereby constitute and appoint the said inspectors, parties hereto of the second part, and the other inspectors and inspector for the time being of these presents, the attornies and attorney of them the said debtors, and each of them, and the survivors and survivor of them, their and his executors and administrators, for them and each of them the said debtors, and in their and his names, to claim, demand, sue for, recover and receive and take possession of all goods, chattels and effects, account books, monies, negotiable or other instruments or securities, being parts of their estate, and being either in this realm or abroad, and to give receipts and acquittances for the same, and to indorse and transfer all bills of exchange, promissory notes or other securities, and bills of lading and other instruments relating to or respecting the ownership of any of the said property, and to appoint delegates or substitutes for all or any of the purposes aforesaid, and to do all or any of the said acts, and to execute and grant powers of attorney and authorities to any person or persons in any counties or places wheresoever to do or perform any such acts or matters as aforesaid, or to collect or get in any of the said estate; and that they the said debtors respectively, their executors or administrators, shall ratify and confirm all acts and matters to be done under the authority herein con-

Power of  
attorney to  
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tained, and shall and will on request from time to time execute all such further or other powers to the said inspectors or inspector for the time being, or to any delegate or substitute, for all or any of the purposes aforesaid, as they shall be requested to execute; and shall not nor will at any time revoke the powers and authorities herein contained, or the powers and authorities so to be executed as aforesaid: Provided always, and it is hereby declared and agreed by and between the parties hereto of the first and second parts, that in case at any time whilst these presents shall be in force the said parties hereto of the second part, or the inspectors or inspector for the time being, shall be of opinion that the said estate or the remaining part thereof ought to be administered in bankruptcy, then and in such case it shall be lawful for the said parties hereto of the second part, or the inspectors or inspector for the time being, and they and he are hereby authorized by the said debtors respectively forthwith to cause the said debtors to be made bankrupts, and thereupon the said debtors shall, at the request of the said parties hereto of the said second part, or the inspectors or inspector for the time being, sign declarations of insolvency in the form provided by The Bankrupt Law Consolidation Act, 1849, and cause such declaration of insolvency to be filed in the proper office in that behalf, in pursuance of the bankrupt law now or then to be in force; and thenceforth these presents, so far as the same prevent or restrain the said creditors from taking proceedings, shall be of no avail, and the property not previously administered shall be distributed in bankruptcy. AND IT IS HEREBY DECLARED AND AGREED by and between all parties hereto, that these presents are intended to be, and shall so far as the same by law may be, a deed of arrangement within the provisions of The Bankrupt Law

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Consolidation Act, 1849, with respect to arrangements by deed, and as such obligatory on all present creditors of the said debtors, but in case the same for any reason cannot so operate, nevertheless the same, subject to the provisions hereof in that behalf, shall be binding on all creditors executing, or acceding to the same. And that it shall be lawful for the inspectors or inspector for the time being, at the expence of the estate, to take and defend all such actions, suits and other proceedings as they may think fit for the purpose of giving effect to these presents and establishing the validity thereof, and supporting the same as such deed of arrangement, and in defence of the said debtors, or any of them, at the suit of any of the creditors of the said firm who may take proceedings against them or him in respect of debts due from, or claims against the said debtors, or any of them, and refuse to be bound by these presents. And also at the like expence to present and prosecute, or permit the said debtors to present and prosecute such petition and other proceedings for the purpose of procuring such order or certificate under The Bankrupt Law Consolidation Act, 1849; as the inspectors or inspector for the time being may think fit.—[Here followed a covenant by one of the debtors to set aside a portion of his future income, and a covenant by another of the debtors to procure and deliver up a certain bill of exchange, for the benefit of the creditors.] In witness, &c.

The deed appeared to have been executed by the debtors, the inspectors, and by various persons purporting to be creditors of the defendants. The execution by the creditors was in the following form:—

Seal.	Amount of Debts.	Witnesses.
John Halliday for self and partner.	( <i>H. S.</i> ) 4919:2:11	W. J. Crossfield.

The defendants, the inspectors, and several creditors

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executed the deed on the day of its date. In order to prove that the deed had been executed by 6-7ths in number and value of the creditors whose debts amounted to 10*l*. and upwards, a certificate of the inspectors, filed with the registrar of the Court of Bankruptcy, in conformity with the 226th section of The Bankrupt Law Consolidation Act, 1849, with an account and affidavit of the defendants appended thereto in conformity with the 227th section, was produced from the Court of Bankruptcy. The account produced included the debts and names of the creditors mentioned in the schedule to the deed. The documents had been filed in January, 1857, the action having been brought in May, 1857. The defendants' solicitor then proved that the deed was, in the month of April, in the same state as to the execution thereof by the several parties as when produced at the trial, except as regarded two creditors who appeared to have executed it since, and whose debts amounted to 95*l*. Excluding these two creditors, 6-7ths in number and value of the creditors appeared to have executed the deed.

The plaintiffs' counsel objected, first, that there was no evidence of the due execution of the deed by the requisite number of the creditors of the defendants: and secondly, that assuming the execution of the deed by the requisite number of the creditors to have been sufficiently proved, the deed was not, upon the face of it, a valid deed under the 224th and 225th sections of The Bankrupt Law Consolidation Act, 1849. The learned Judge directed a verdict for the defendants, reserving to the plaintiffs leave to move to enter a verdict for them.

*Knowles*, in last Michaelmas Term, obtained a rule *Nisi* to enter a verdict for the plaintiffs, pursuant to the leave reserved or for a new trial.

*Hugh Hill, Bovill, Mellish and Honyman* now shewed cause.—First, there was evidence that the deed was signed by creditors sufficient in number and value.—(The Court intimated an opinion that they were satisfied on that point.)—Secondly, it is objected that the deed is not, upon the face of it, a valid deed of arrangement under the 224th and 228th sections of The Bankrupt Law Consolidation Act, 1849, because it does not provide for the distribution of the debtors' estate as under a bankruptcy, nor amongst all their creditors. No doubt the estate must be distributed as in bankruptcy; but it is not necessary that, in collecting the assets, the precise rule in bankruptcy should be followed. The legislature, in the 228th section, describes in very general terms the nature of the deed of arrangement. In order, therefore, to ascertain the intention of the legislature, it is necessary to consider the object of the enactment, and the grievance intended to be remedied by it. Before the Bankrupt Law Consolidation Act, 1849, means were adopted for distributing the assets of an insolvent trader amongst his creditors without resorting to bankruptcy. Two modes in general prevailed, viz., an assignment of all the debtors' estate and effects, in trust for the benefit of his creditors, and a winding up of his affairs under a deed of inspection, in which large powers were given to the inspectors. The latter was more popular, because under it a greater amount of assets was obtained, since the debtor could realize them better than another person. It was competent, however, for two or three creditors to a small amount to defeat the arrangement. The legislature intended to remedy that evil by providing that a deed of arrangement, signed by 6-7ths in number and value of those creditors whose debts amounted to 10*l*., should be binding on all creditors who had not signed. The term "inspector," in the 226th section, means an inspector having the usual and ordinary powers which

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were found so beneficial to creditors. It is true that this deed purports to be made with those creditors only who execute it, but its object is to provide for the entire distribution of the debtors' estate amongst all the creditors. Therefore, assuming that the dictum of *Parke, B.*, in *Lar-pent v. Bibby (a)*, is law, this case is distinguishable. If any of the provisions in the deed admit of two interpretations, that construction must be put upon them which will effectuate the intention of the parties.

The first objection to the deed is, that it does not contain any express assignment of the property of the debtors, but only a covenant to assign when required by the inspectors. A simple deed, by which debtors are allowed to wind up their affairs for the benefit of all the creditors, may be a good deed of arrangement under the 224th section, without any assignment. In *Macnaught v. Russell (b)* the deed was a deed of inspection merely; and the greater part of the deeds by which estates have been wound up under this clause have been so. A deed is not necessary; the 224th section speaks of a "memorandum of arrangement" as distinct from a deed. The 226th section empowers "the trustee or inspector under any such deed or memorandum of arrangement, or if there shall be no such trustee or inspector," then two creditors, to certify. The object is, that the parties should be left as free as possible to make their own arrangements for realizing the amount of the estate for the benefit of the creditors. There are great objections to a deed of assignment. The execution of it would be an act of bankruptcy, which would enable creditors who had not assented to it, at once and against the will of the general body of creditors, to make the debtor a bankrupt. In the present case, an absolute

(a) 5 H. L. Cas. 481.

(b) 1 H. & N. 611.

control over the debtors and their estate is vested in the inspectors. It is provided by section 30 (a), that the debtors "shall not interfere or act in the winding up of the said business, or in any other way connected with the said estate or the affairs thereof, except so far as they or either of them may be required by the inspectors or inspector for the time being, so to interfere or act." By section 21 (b), if the inspectors require it, the debtors are to convey and assign all their estate to the inspectors, or to such person as they may direct. The deed does not contemplate the carrying on the business, but only the winding up of the estate. By the 224th section, the deed must provide for "the distribution, inspection, conduct, management and mode of winding up of the estate:" no mention is made of an assignment. This deed complies with all the requisites of the statute. In *Tetley v. Taylor* (c) there was no assignment. [*Watson, B.*—That was the case of a composition deed.] In *Cooper v. Thornton* (d) the whole of the debtor's estate was conveyed to trustees, but they were empowered to give back to the debtor effects to the value of 20*l*. In *Ex parte Wilkes* (e) there was no assignment of the debtor's property. The deed in this case is similar to that in *Macnaught v. Russell* (f).

Secondly, it is said that by the 6th clause (g) provision is made for the payment of costs incurred prior to the execution of the deed. But that clause, which is a covenant by the debtors that they will *aid* in dividing the estate, must be read as referring to the 9th rule (h), in which these general words do not occur. The costs provided for by that rule are simply those relating to or incidental to the

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(a) See p. 71.

(b) See p. 62.

(c) 1 E. &amp; B. 521.

(d) 1 E. &amp; B. 544.

(e) 5 De Gex, M'N. &amp; G. 418.

(f) 1 H. &amp; N. 611.

(g) See p. 42.

(h) See p. 51.

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arrangement. Some preliminary expences must of necessity be incurred. The usual course of proceeding is, in the first place, to call the creditors together and present to them a statement of the debtor's assets and liabilities, prepared by an accountant. The creditors then determine whether the estate shall be wound up under a deed of inspection. How are those expences to be paid? The accountant would not prepare the balance sheet upon the terms of being paid out of any assets which might be realised. Therefore some provision must be made for payment of expences incurred prior to the execution of the deed. These expences would be allowed in bankruptcy, and, even if they would not, they ought to be allowed under a deed of inspection, since by that means the creditors gain an advantage in winding up the estate at less cost.

Thirdly, it is said that though the deed bears date on the 16th of December, the money arising from the estate is to be divided amongst those persons who would have been creditors under an adjudication of bankruptcy on the 12th of November<sup>(a)</sup>, and therefore that the deed does not provide for a distribution amongst all the creditors. A similar objection was made unsuccessfully in *Macnaught v. Russell* <sup>(b)</sup>. Here there was no evidence that there were any creditors who became such between the 12th of November and the 16th of December; if there had been it was for the plaintiffs, who would avoid the deed, to have proved it. In the case of *Macnaught v. Russell* there was an averment that no person became a creditor after the execution of the deed: here there is an averment that everything has happened necessary to give validity to the deed as a deed of arrangement.—(The Court intimated an opinion that they need not further argue this point.)

(a) See clause 6, p. 42.

(b) 1 H. & N. 611.

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Fourthly, it is contended that, by the second rule (a), the inspectors have power to direct and authorize the debtors to carry on or conduct for the purpose of winding up, and to wind up the business, and for that purpose to employ them and pay them for their services, and that this invalidates the deed. [*Martin, B.*—There is another section which provides for subsistence money.] It is constantly the practice in bankruptcy for the assignee to employ the bankrupt. [*Watson, B.*—When a bankrupt gives his services in making up the books, an allowance is usually made to him for the work. *Channell, B.*—The official assignee reports the assistance which he has received, and the Commissioner makes an order for the allowance.] Such an allowance is expressly sanctioned by the 160th section of The Bankrupt Law Consolidation Act, and orders for it are sometimes made, notwithstanding the opposition of creditors. The objection here is, that the inspectors and not the creditors are the persons who are to make the allowance; but inspectors must have a power to employ and pay persons, to enable them to execute the trust reposed in them. It could never have been intended that a deed of arrangement should be invalidated by a provision which is necessary for carrying it into effect.

Fifthly, it is objected that by rule 4 (b) the inspectors are empowered to advance money for any operation they please, and that therefore the deed is not within the 228th section. But there is no power to carry on trade except for the purpose of winding up the estate. By the 150th section of The Bankrupt Law Consolidation Act, 1849, "the assignees may, with the approbation of the Court, appoint the bankrupt himself to superintend the management of the estate, or to carry on the trade

(a) See p. 47.

(b) See p. 48.



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for the behoof of the creditors, and in all or any other respects they may think fit to aid them in administering the bankrupt's estate and effects." If goods which had been ordered by the debtors were subject to the charge of freight, and could not be got without payment of it, or if money were required to put goods into a marketable condition, advances would be justifiable. The advances are to be "in furtherance of the objects contemplated in and by those presents, or any of them;" that is, the winding up of the estate, and "on account of any mercantile or other operations which *shall have been* undertaken by the said debtors or either of them." Advances for future operations are not contemplated. Suppose the debtors had been iron-masters or tailors, it would surely have been proper to authorize the inspectors to work up the stock. The 194th section of The Bankrupt Law Consolidation Act, 1849, enables the Court to make allowance to the bankrupt for the support of himself and his family, and the sanction of the creditors is not required.

Sixthly, it is objected that the 19th rule (a) provides, (amongst other things) that in case any dividends shall be made before all the creditors shall have executed, the inspectors shall be at liberty, *if they shall think fit*, to direct the retention of a sufficient sum or sums for the purpose of paying dividends to those creditors who shall not have executed or acceded to the deed. That, however is in accordance with the ordinary course and practice in bankruptcy, where, if the assignees think fit, they may retain money to meet future expected proofs. The Commissioner may direct money to be retained for such purposes, or he may direct the distribution of the whole estate got in. If the inspectors improperly exercise

(a) See p. 60.

the discretion reposed in them by this rule, the parties aggrieved have a remedy by applying to the Court of Bankruptcy under the 229th section of the Bankrupt Law Consolidation Act, 1849. [*Watson, B.*—It is clear that under the deed all the creditors are entitled to a dividend.]

Seventhly, there is a proviso in the 24th rule (a) which empowers the inspectors, notwithstanding the entire estate of the debtors shall not have been wound up, to grant a certificate to such one or more of the debtors as the inspectors shall certify to be entitled thereto, and such certificate is to operate as a certificate of conformity under The Bankrupt Law Consolidation Act. This is said to be a power not contemplated by the 224th section. But the deed or memorandum of arrangement is to be "touching such trader's liabilities and his release therefrom."

Eighthly, the inspectors, by the 28th rule (b), have power to declare the deed void, except as to matters done under it. If the deed is declared void, the release which is founded upon it will also be of no effect. By the 31st rule (c), the debtors are to facilitate operations in bankruptcy by signing declarations of insolvency, if called upon to do so. The power under the 28th rule to avoid the deed cannot be exercised until after the expiration of three months from its date, but within one month thereafter; and the practical effect of that power is to secure an equal division of the debtor's estate amongst all his creditors. If the deed did not contain such a power, one creditor might claim his debt in full, and refuse to execute the deed unless he was paid, to the prejudice of creditors who had executed the deed. The exercise of the power is similar to annulling a fiat in bankruptcy; *Smallcombe v. Olivier* (d).

(a) See p. 65.

(c) See p. 72.

(b) See p. 69.

(d) 13 M. &amp; W. 77.

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Ninthly, it is objected that part of the 28th (a) rule which empowers the trustees to retain 500*l*. out of the estate as a fund for their indemnity, prevents this from being a deed for the distribution of *all* the debtor's estate. But this is only an ordinary mode of indemnifying the inspectors.

*Knowles* and *Quain*, in support of the rule.—First, there was no evidence of the signature of the deed by 6-7ths in number and value of the creditors. The 226th section provides, "That when the trustee or inspector under any such deed of arrangement, &c., shall be satisfied that 6-7ths in number and value of the creditors, whose debts amount to 10*l*. and upwards, have signed such deed or memorandum, it shall be lawful for such trustee or inspector, &c., to certify the same to the Court in writing, and such certificate shall be filed with the registrar of the Court, and shall thereupon be *primâ facie* evidence in all Courts of law and equity that such deed or memorandum of arrangement has been so signed." This certificate is not evidence under these pleas here pleaded, because it was not filed until after the commencement of the action. The defendants should have pleaded in bar of the further maintenance of the action. Then, was the evidence of the defendants' attorney, who is not the attesting witness, sufficient to prove the signatures? If the plaintiffs resort to that mode of proof, they must prove that the signatures were written by the parties. The deed must either be proved in the statutory form, or in the regular way, by evidence of its execution. [*Pollock*, C. B.—The effect of the 226th section is to render the document *primâ facie* evidence of what it purports to be. The production of the certificate proves that the requisite number of signatures were appended at the time it was given. Then there is the evidence of a person who

has had the custody of the deed, and who says that, with one exception, it is in precisely the same condition as it was two months ago: coupling that with the certificate, there is evidence for the jury of the due execution of the deed.]

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Secondly, the deed is delusive, and does not provide any effectual security for the creditors: it is therefore void. In the cases hitherto before the Courts, with respect to the validity of a deed, under the 224th section, to bind non-executing creditors, two points have been chiefly considered, viz., that the deed must provide for the distribution of the whole estate, and amongst all the creditors. It is said that a deed which complies with those requirements is sufficient, however unsatisfactory it may be to the non-signing creditors. Before the statute a deed of inspectorship, or letter of licence, did not affect the rights of third parties. A deed of assignment had that effect collaterally, because it deprived the non-executing creditors of the fund to which they might otherwise have looked. The validity of such deeds was sometimes discussed before the statute, as in *Pickstock v. Lyster* (a). In *Owen v. Body* (b), an assignment to trustees, for the benefit of all creditors who might execute the deed, which authorized the trustees to carry on the debtors' trade, and contained such terms that the creditors subscribing would have become partners in the business, was held not to be valid as against creditors who did not execute it. That case is recognised in *Hickman v. Cox* (c). *Coates v. Williams* (d), and *Janes v. Whitbread* (e) shew that before this statute the whole deed must have been considered by the Court. [*Martin, B.*—] Do you contend that the Court must go through the deed and decide what is reasonable between the debtors and their creditors? Where is any authority

(a) 3 M. & Sel. 371.

(b) 5 A. & E. 28.

(c) 18 C. B. 617.

(d) 7 Exch. 205.

(e) 11 C. B. 406.

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given to the Court to set aside a deed providing for the distribution of the whole estate amongst all the creditors, and assented to by 6-7ths of the creditors?] The Court must see that the deed gives reasonable security to the dissentient creditors who are to be bound by it. In *Ex parte Wilkes (a)*, Lord Justice *Knight Bruce* says:—"A deed, which is neither a deed of composition, nor does, to the extent of the indebted trader's means, or so far as circumstances will allow, provide in a reasonable manner some satisfaction, some effectual security, or some effectual protection for his creditors, ought not, according to a proper view of the six sections, to be considered as coming within the 224th." That case is an express authority in favour of the proposition for which the plaintiffs contend. The provision for carrying on the trade was in that case, as in this, ancillary to the winding up the estate. This deed is not one which affords reasonable security to such creditors. It gives no greater security to the creditors than the deed in *Ex parte Wilkes (a)*. The letter of licence is absolute in itself, so that, though the debtors squander the estate, the release may be binding. In *Forsyth on Composition with Creditors*, the definition of a letter of licence is, when "the creditors covenant for a temporary suspension of their rights, and bind themselves not to sue or molest their debtor for a certain specified time." [*Martin, B.*—How is this a greater protection than a certificate in bankruptcy would have been? It would be no answer to a certificate to say that the bankrupt had not kept proper accounts. The object probably was, to give to the release the same effect as to a certificate.] An inspectorship deed, with no provision that it is to be void if the covenants contained in it are not observed by the debtor, may be said to be "defective, ineffectual and delusive," as the deed in *Ex parte Wilkes (a)* was said to be by the Lords Justices.

(a) 5 De Gex, M'N. & G. 418; see p. 437.

Such a proviso is found in the precedents in Martin's Conveyancing, p. 462, see p. 471: Forsyth on Composition with Creditors, Appendix, p. 240. That is the ordinary form. [*Martin*, B.—The Act says nothing about the ordinary form.]

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Thirdly, the deed is invalid, because it does not provide for the distribution of the estate as in bankruptcy. The object of the legislature was to give to creditors all the benefit of a fiat in bankruptcy without its expense; and they intended that the estate should be administered as in bankruptcy: this appears from the 228th section. That intention is not carried out by this deed. First, the whole estate is left in the debtors: there is no conveyance of any part of it to the inspectors; whereas it should have been assigned to them, since they represent the assignees under a bankruptcy. It is argued that such an assignment would be an act of bankruptcy; but it is not one of which the creditors could take advantage. The 224th section expressly provides that "such deed, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior or subsequent act of bankruptcy." Creditors who sign the deed cannot treat it as an act of bankruptcy, and, by s. 226, the creditors who do not sign are bound as if they had signed. In *March v. Warwick* (a) there was an assignment to trustees. In *Ex parte Wilkes* (b), the Lords Justices held the deed of arrangement bad, because it contained no assignment of the debtor's estate to the trustees. There is nothing in this deed which clothes the property of the debtors with any trust. If they died, it would vest in their personal representatives. [*Watson*, B.—They would be trustees for the creditors.] It is said that the 224th section expressly contemplates a deed of inspection; but the words would be satisfied by construing "inspection" to apply to matters of

(a) 1 H. & N. 158.

(b) 5 De Gex, M'N. & G. 418.

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which it would be impossible to make an assignment. [*Martin*, B., referred to sect. 226.]

Fourthly, the deed does not render it imperative on the debtors to realize the assets. They do not covenant absolutely to convert the estate into money, but only at the request and under the direction of the inspectors; and inasmuch as the latter have the power to grant a certificate, the debtors might receive it before the whole estate was realized, and thus the object of the deed be defeated.

Fifthly, the covenant by the debtors to pay costs and expenses, whether incurred under the deed or prior to its execution, operates to prevent the distribution of the *entire* estate amongst the creditors. In *Drew v. Collins* (a), *Pollock*, C. B., said: "The 228th section is quite clear and distinct, that the distribution of the trader's property shall be according to the rule in bankruptcy; and, if that overrides all arrangements by deed, as in my opinion it does, it must have been intended that in these cases there should be a *division* of the property, subject to such arrangement as the creditors may agree to, the object of that arrangement being to avoid the costs of bankruptcy, and to facilitate the distribution of the property without an expensive machinery." *March v. Warwick* (b) is an express authority that a deed of arrangement must provide for the distribution of *all* the property. Here the payment of the costs antecedent to the arrangement would diminish the fund to which the creditors are entitled.

Sixthly, the deed does not extend to persons who may become creditors between the 12th November and 16th December. [*Pollock*, C. B.—There was no evidence that there were any creditors between those times.]

Seventhly, the power to make advances to the debtor invalidates the deed as against the non-signing creditors.

(a) 6 Exch. 670.

(b) 1 H. &amp; N. 158.

The advances are not limited to mercantile operations, but may embrace any "other operations" in which the debtor may engage. They may therefore be made for any speculation in which the debtor may engage, either in building, the purchase of shares, or otherwise, and either for necessary repairs or ornament.

Eighthly, the deed is void as against non-signing creditors, because the inspectors are not bound to retain the dividends payable to a creditor who had not signed at the time of the declaration of the dividend. The 19th clause only provides that the inspectors "shall be at liberty, if they shall think fit," to retain those dividends. The inspectors might therefore distribute all the assets among the creditors who had signed, and then there would be nothing left for those who might afterwards accede to the arrangement. This provision is not in accordance with the usual form which is to be found in *Martin's Conveyancing*, p. 468; *Forsyth on Composition with Creditors*, Appendix, p. 234. Again, by this clause, after the first dividend has been declared, the inspectors are to have the option whether or not they will pay the first dividend to the creditors for whom no dividend has been retained.

Ninthly, the 28th rule invalidates the deed. It cannot have been intended that parties not signing should be bound by a clause providing that the inspectors shall have power to avoid the deed. [*Pollock, C. B.*—I think it most reasonable. A deed of inspection ought to contain a provision of this sort. Suppose some friend of the debtors came forward and paid their debts. I think that the majority of creditors which is empowered to render a deed binding may well approve of such a clause as this.]

Tenthly, although it enables the inspectors, in a certain event, to avoid the deed, it excepts from the consequences of the avoidance "all acts, proceedings, conveyances, assignments, assurances, matters and things then done under and by

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virtue of the deed." Then, if that clause be taken in connection with the 24th rule, which authorizes the inspectors, notwithstanding the entire estate might not be wound up, to grant a certificate which is to operate as a certificate in bankruptcy, the practical effect will be that though the deed is avoided, the certificate would be valid as an act done under it, and consequently a bar to any action by a non-signing creditor. [*Channell, B.*—Is it contended that a certificate in bankruptcy would have any effect after the bankruptcy had been superseded?]

*POLLOCK, C. B.*—We are all of opinion that the rule must be discharged; but in consequence of the importance of the case we will give our reasons on a future day.

The judgment of the Court was now delivered by

*CHANNELL, B.*—This case was tried before the Lord Chief Baron at the London sittings after last Trinity Term. The action was for money had and received by the defendants to the plaintiffs' use. The defendants Thomas Gray and Henry Gray in one plea, and the defendant Hutton in another plea, pleaded, by way of defence, a deed of arrangement under The Bankrupt Law Consolidation Act, 1849, made between the defendants, certain inspectors therein named, and certain creditors of the defendants. The two pleas set out the deed somewhat differently, but each plea averred that the deed had been executed by 6-7ths in number and value of the defendants' creditors, and that all things had happened necessary under the statute to make the deed obligatory on the creditors of the defendants who had not signed it. On each of these pleas the plaintiffs took issue.

At the trial, a deed dated the 16th day of December, 1856, was produced and read in evidence. It was executed by the defendants, by the inspectors, and by various persons

purporting to be creditors of the defendants: it was not executed by the plaintiffs. The defendants produced from the Court of Bankruptcy a certificate of the inspectors filed there in conformity with the 226th section of the 12 & 13 Vict. c. 106, and an account and affidavit of the defendants in conformity with the 227th section. The account produced included the debts and names of the creditors mentioned in the schedule to the deed. These documents, had they been filed before action brought, would have been sufficient *prima facie* evidence of the due execution of the deed by 6-7ths in number and value of the defendants' creditors;—sect. 226. But they were not filed till June, 1857, and the action was brought in May, 1857. The defendants proved that the deed was for some time before the commencement of the action in the same state, as to the execution thereof by the several parties, as when produced at the trial, except as regards the two last creditors, who appeared to have executed, and whose debts amounted to 95*l*. Without these two creditors, 6-7ths in number and value appeared to have executed the deed. It was objected that there was no evidence of the due execution of the deed by the requisite number of the creditors of the defendants. The Lord Chief Baron thought there was evidence to go to the jury.

It was further objected that, assuming the execution of the deed by the requisite number of the creditors to have been sufficiently proved, the deed was not upon the face of it a valid deed under the 224th and 228th sections of the 12 & 13 Vict. c. 106. The objection as to the validity of the deed was reserved, and a verdict entered for the defendants, with liberty for the plaintiffs to move to set it aside and have it entered for the plaintiffs.

In Michaelmas Term last a rule was obtained in the alternative to enter the verdict for the plaintiffs pursuant

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to leave reserved, or for a new trial on the objection taken at the trial, but not reserved, that sufficient evidence had not been given of the due execution of the deed. This rule came on for argument in the course of last Term. My brother *Martin*, not having been present during the whole of the argument, is not a party to this judgment, which is to be considered that of the Lord Chief Baron, my brother *Watson* and myself.

We expressed our opinion in the course of the argument that the documents from the Bankruptcy Court, though not filed till after action brought, coupled with the evidence as to the state of the deed as regards execution before the action, were evidence to go to the jury as to the due execution by the requisite number of creditors before action brought, and that there ought to be no new trial.

The objection that the deed does not sufficiently provide for the distribution of the defendants' estate as under a bankruptcy, nor for the distribution of the estate amongst all the creditors, was endeavoured to be supported on various grounds.

We agree that the trusts of the deed must be such as to enure for the distribution of all the debtor's estate and effects amongst all his creditors. This Court, in *Drew v. Collins* (a), and the Court of Common Pleas in *Bell v. Fisher* (b), decided that a deed of arrangement must provide for a distribution of all the trader's estate amongst all his creditors. The Court of Exchequer Chamber in the case of *Tetley v. Taylor* (c), on a writ of error brought upon a decision of the Court of Queen's Bench, decided the same. This question was afterwards much discussed in the House of Lords in the case of *Larpen and Another v. Bibby and Another* (d). It was not however then determined. The

(a) 6 Exch. 670.

(b) 12 C. B. 363.

(c) 1 E. &amp; B. 521.

(d) 5 H. L. Cas. 481.

Judges who heard the argument were not altogether agreed upon this point, and the case was decided on another ground. The Court of Common Pleas has, since the case of *Larpen v. Bibby*, viz. in the case of *Bloomer v. Darke* (a), held that a plea of arrangement under the 224th section is not good unless it shews on the face of it that the deed is for the distribution of the whole of the debtor's estate, and ensures for the benefit of the whole of the creditors. No part of the trader's property is in terms, or, as we think, by necessary implication, excluded from the operation of the present deed, as was the case in *Drew v. Collins* and *Tetley v. Taylor*.

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The deed in this case, we think, clearly contemplates a right on the part of the inspectors to deal with and to have the management, control and disposal, either with or without the aid of the debtors, of all the property of the debtors. No creditor is, we think, excluded from a right to participate in a division of the property. The deed, it is true, purports to be made with the creditors who execute. But the covenant of the debtors is to assist in dividing the money (after providing for certain expenses) amongst their several creditors, being such as would be creditors under an adjudication of bankruptcy on the day of the meeting, and treating such creditors as creditors for such sums as they might on, or subsequent to the 12th of November, have been entitled to prove for. If it be said that this provision refers only to creditors who were so on the 12th of November, so as to entitle such creditors to receive a dividend in respect of any additional debt incurred between that day and the date of and execution of the deed, and that it does not extend to creditors first becoming so between those dates, we consider such an objection answered by the decision of this Court in the case of *Macnaught v. Russell* (b),

(a) 2 C. B., N. S., 165.

(b) 1 H. &amp; N. 611.

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to which decision we adhere. The language of the deed in this case, so far as the present objection is concerned, is not distinguishable from that in *Macnaught v. Russell*, and it does not appear in this case, any more than in that, that any persons became creditors between the date of the meeting and the date and execution of the deed.

It was contended that, even if no particular class of creditors could be considered excluded, the creditors generally were deprived of their right to participate, to the full extent to which they are entitled, in the proceeds of the debtors' property, inasmuch as the deed contains provisions for payments, allowances, and a retention of money unauthorized by the bankruptcy laws, and that such provisions, if acted upon, would or might improperly withdraw from distribution amongst the creditors a portion of the debtors' property to which they were entitled. Now, as regards deductions for charges and expenses, costs of management, &c., we hold that the rules and practice in bankruptcy do not in all respects strictly apply. No doubt the 228th section of the 12 & 13 Vict. c. 106 provides that the creditors of every such trader shall have the same rights respectively as to set-off, mutual credit, lien, and priority, and joint and separate assets shall be distributed in like manner as in bankruptcy. So far as regards the matters here enumerated the rule in bankruptcy is to apply. But we do not think it was the intention of the Legislature to prevent creditors, 6-7ths in number and value, authorizing the payment of expenses reasonably necessary to the execution of the trusts, although similar expenses might not be allowed in bankruptcy, even with the consent of the Commissioners, without also the concurrence of the creditors. Expenses allowed under a bankruptcy are those incurred in the execution of what is done in accordance with the practice in bankruptcy. Here the object of the

Legislature was to enable traders, with the consent of a certain number of their creditors, to effect a distribution without bankruptcy, and precisely analogous rules as to charges and allowances cannot prevail.

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We now proceed to notice the particular objections made to the deed. It was objected that the authority in the provision or rule numbered 2 in the deed, to employ the debtors in winding up the business and affairs under the direction of the inspectors, and for the traders to employ persons under them, with the sanction of the inspectors, and to pay such persons &c. such reasonable remuneration as the inspectors should think fit, diverts the proper distribution of the assets. We think the payment here provided for is not repugnant to any rule or practice in bankruptcy so far as such practice can apply. Such a payment might, we think, have been made under a bankruptcy, at least as regards the bankrupt. See 12 & 13 Vict. c. 106, s. 150. If to the bankrupt, why not to those who assist him, employed by him with the sanction of the inspectors?

It was further objected that the authority to the inspectors, given by provision No. 4, to make advances, avoided the deed as against non-signing creditors. We think not. The inspectors are only authorized to advance in respect of any mercantile or other operations which may have been commenced by the traders, and when they found it for the interest of the creditors so to do, and in furtherance of the objects contemplated by the deed. Such a discretion, we think, may well be given to the inspectors by creditors amounting to 6-7ths in number and value.

Mr. Knowles further objected to the words in the debtors' covenant, which provide for costs and expenses incurred, whether under or by virtue of those presents "or prior to the execution thereof." We think, we give, the covenant, so far as it relates to this matter, a reasonable construction

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by holding it to mean expenses of and attending the preparation of the deed and perusal thereof, and the arrangement of the trader's affairs between the meeting of creditors and the execution of the deed, and of such other expenses as, if incurred before the meeting, were reasonably incurred in immediate connection with and for the purpose of that meeting.

He also objected to the 9th provision, so far as it applies to expenses incurred in or relating or preparatory to the said meeting, and incident thereto, and to the investigation of affairs since the debtors stopped payment. We place, in effect, a similar construction upon the 9th rule to that we have given to the covenant, and, taking the covenant and the rule together, we are of opinion that the deed so far does not provide for any payment out of, or application of, the monies to be realized from the trader's property which can avoid the deed.

It was further objected that the deed was void as against non-signing creditors, because, by the 19th provision, the inspectors were not bound to retain the dividend which would be payable to a trader who at the declaration of the dividend had not acceded to the deed. It is always to be remembered that a non-signing creditor is not bound at all until the expiration of three calendar months from notice of the deed. If he does not, during that time, or afterwards, until a dividend has been declared and paid, accede to the deed, then the provision that he shall be allowed to prove so as to have the dividend out of existing or future acquired funds before any other dividends are paid, but without disturbing dividends already paid, seems to us to be unobjectionable.

It was further objected that the provision for retaining the 500*l.* mentioned in the 28th rule avoided the deed as against non-signing creditors. The losses, costs and ex-

penses therein mentioned must be taken to be losses, costs and expenses properly incurred by the inspectors under the authority of the deed, and whilst it was in operation, but not satisfied or paid. The provision to retain, in the event of the deed being avoided, a limited sum to meet and pay such losses and expenses, if any, and to return the overplus to the parties entitled, cannot, we think, carry with it the construction contended for by the plaintiffs' counsel.

It was further objected that the 28th provision in the deed, though it provides in a given event for avoiding the deed, excepts from the consequence of the avoidance all acts, proceedings, conveyances, assignments, assurances, matters and things then done under and by virtue of the deed; and that this provision must be read in connection with the 24th, which authorizes the inspectors, notwithstanding the entire estate might not be wound up, to grant a certificate to one or more of the debtors, which shall, as regards such debtor, operate in all respects as a certificate of conformity under the Bankrupt Act. It was contended by the plaintiff's counsel that such a certificate might, under the 24th rule, be given immediately after the execution of the deed; that the deed might, under rule 28, be afterwards avoided, and yet that a certificate previously given would be upheld as an act done, and be an answer to the claim of a non-signing creditor suing for his debt after avoidance of the deed. We think it would not. The power to avoid the deed under provision 28 is a power to be exercised within a limited time, not till after the expiration of three calendar months from the date of the deed, but within one month from the expiration of the three months. One part of rule 24 provides for a certificate to be given in two instances; viz., first, if and when the estate shall have been fully administered. The deed is not then

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which it would be impossible to make an assignment. [*Martin*, B., referred to sect. 226.]

Fourthly, the deed does not render it imperative on the debtors to realize the assets. They do not covenant absolutely to convert the estate into money, but only at the request and under the direction of the inspectors; and inasmuch as the latter have the power to grant a certificate, the debtors might receive it before the whole estate was realized, and thus the object of the deed be defeated.

Fifthly, the covenant by the debtors to pay costs and expenses, whether incurred under the deed or prior to its execution, operates to prevent the distribution of the *entire* estate amongst the creditors. In *Drew v. Collins (a)*, *Pollock*, C. B., said: "The 228th section is quite clear and distinct, that the distribution of the trader's property shall be according to the rule in bankruptcy; and, if that overrides all arrangements by deed, as in my opinion it does, it must have been intended that in these cases there should be a *division* of the property, subject to such arrangement as the creditors may agree to, the object of that arrangement being to avoid the costs of bankruptcy, and to facilitate the distribution of the property without an expensive machinery." *March v. Warwick (b)* is an express authority that a deed of arrangement must provide for the distribution of *all* the property. Here the payment of the costs antecedent to the arrangement would diminish the fund to which the creditors are entitled.

Sixthly, the deed does not extend to persons who may become creditors between the 12th November and 16th December. [*Pollock*, C. B.—There was no evidence that there were any creditors between those times.]

Seventhly, the power to make advances to the debtor invalidates the deed as against the non-signing creditors.

(a) 6 Exch. 670.

(b) 1 H. &amp; N. 158.

The advances are not limited to mercantile operations, but may embrace any "other operations" in which the debtor may engage. They may therefore be made for any speculation in which the debtor may engage, either in building, the purchase of shares, or otherwise, and either for necessary repairs or ornament.

Eighthly, the deed is void as against non-signing creditors, because the inspectors are not bound to retain the dividends payable to a creditor who had not signed at the time of the declaration of the dividend. The 19th clause only provides that the inspectors "shall be at liberty, if they shall think fit," to retain those dividends. The inspectors might therefore distribute all the assets among the creditors who had signed, and then there would be nothing left for those who might afterwards accede to the arrangement. This provision is not in accordance with the usual form which is to be found in Martin's Conveyancing, p. 468; Forsyth on Composition with Creditors, Appendix, p. 234. Again, by this clause, after the first dividend has been declared, the inspectors are to have the option whether or not they will pay the first dividend to the creditors for whom no dividend has been retained.

Ninthly, the 28th rule invalidates the deed. It cannot have been intended that parties not signing should be bound by a clause providing that the inspectors shall have power to avoid the deed. [*Pollock, C. B.*—I think it most reasonable. A deed of inspection ought to contain a provision of this sort. Suppose some friend of the debtors came forward and paid their debts. I think that the majority of creditors which is empowered to render a deed binding may well approve of such a clause as this.]

Tenthly, although it enables the inspectors, in a certain event, to avoid the deed, it excepts from the consequences of the avoidance "all acts, proceedings, conveyances, assignments, assurances, matters and things then done under and by

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virtue of the deed." Then, if that clause be taken in connection with the 24th rule, which authorizes the inspectors, notwithstanding the entire estate might not be wound up, to grant a certificate which is to operate as a certificate in bankruptcy, the practical effect will be that though the deed is avoided, the certificate would be valid as an act done under it, and consequently a bar to any action by a non-signing creditor. [*Channell, B.*—Is it contended that a certificate in bankruptcy would have any effect after the bankruptcy had been superseded?]

*POLLOCK, C. B.*—We are all of opinion that the rule must be discharged; but in consequence of the importance of the case we will give our reasons on a future day.

The judgment of the Court was now delivered by

*CHANNELL, B.*—This case was tried before the Lord Chief Baron at the London sittings after last Trinity Term. The action was for money had and received by the defendants to the plaintiffs' use. The defendants Thomas Gray and Henry Gray in one plea, and the defendant Hutton in another plea, pleaded, by way of defence, a deed of arrangement under The Bankrupt Law Consolidation Act, 1849, made between the defendants, certain inspectors therein named, and certain creditors of the defendants. The two pleas set out the deed somewhat differently, but each plea averred that the deed had been executed by 6-7ths in number and value of the defendants' creditors, and that all things had happened necessary under the statute to make the deed obligatory on the creditors of the defendants who had not signed it. On each of these pleas the plaintiffs took issue.

At the trial, a deed dated the 16th day of December, 1856, was produced and read in evidence. It was executed by the defendants, by the inspectors, and by various persons

purporting to be creditors of the defendants; it was not executed by the plaintiffs. The defendants produced from the Court of Bankruptcy a certificate of the inspectors filed there in conformity with the 226th section of the 12 & 13 Vict. c. 106, and an account and affidavit of the defendants in conformity with the 227th section. The account produced included the debts and names of the creditors mentioned in the schedule to the deed. These documents, had they been filed before action brought, would have been sufficient *prima facie* evidence of the due execution of the deed by 6-7ths in number and value of the defendants' creditors;—sect. 226. But they were not filed till June, 1857, and the action was brought in May, 1857. The defendants proved that the deed was for some time before the commencement of the action in the same state, as to the execution thereof by the several parties, as when produced at the trial, except as regards the two last creditors, who appeared to have executed, and whose debts amounted to 95*l*. Without these two creditors, 6-7ths in number and value appeared to have executed the deed. It was objected that there was no evidence of the due execution of the deed by the requisite number of the creditors of the defendants. The Lord Chief Baron thought there was evidence to go to the jury.

It was further objected that, assuming the execution of the deed by the requisite number of the creditors to have been sufficiently proved, the deed was not upon the face of it a valid deed under the 224th and 228th sections of the 12 & 13 Vict. c. 106. The objection as to the validity of the deed was reserved, and a verdict entered for the defendants, with liberty for the plaintiffs to move to set it aside and have it entered for the plaintiffs.

In Michaelmas Term last a rule was obtained in the alternative to enter the verdict for the plaintiffs pursuant

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doubtful terms. He added that, independently of other considerations, it was open to doubt whether, in the event of the trader dying within three years, the trustees of the deed could take possession of any part of the property as against the executors.

There was not in that case any conveyance or assignment of the trader's property. So far, that and the present case are alike. But the Lords Justices appear to have thought that the power on the part of the trustees to take possession was not meant by the deed to operate in all events at the discretion of the trustees, but only in certain events expressed, not in unequivocal, but in obscure or doubtful terms. Such a view does not, in our opinion, attach to the deed in the present case, and we think the case *Ex parte Wilkes* is not an authority for the proposition for which it was urged at the bar, viz. that an actual conveyance or assignment is necessary to give effect to a deed of inspection. We think none of the objections insisted upon before us ought to prevail, and we are of opinion that our judgment must be for the defendants, and that the rule obtained by the plaintiffs must be discharged.

Rule discharged.



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## LEY v. PETER.

Feb. 25.

**EJECTMENT.**—The action, which was commenced in May, 1857, was brought to recover certain property in the parish of Perranzabuloe, part of which was 1-3rd of a meadow called Barn Meadow.

At the trial, before *Crompton*, J., at the last Summer Assizes for the county of Cornwall, it appeared that in 1765 one Gilbert granted a lease for three lives of certain property, including this meadow, which was part of the manor of Ventongimpa. The lease expired in 1818. At that period, one Thomas, who was the tenant under the lease, had become entitled to the reversion of two undivided thirds of Barn Meadow, the plaintiff being entitled to the other third. Thomas continued in possession of Barn Meadow until his death in 1826. His son in law William Peter, the father of the defendant, continued to occupy till his death, which took place about the year 1836. The present defendant then entered or continued in possession, and has remained in possession till the present time. No evidence was given of any possession or receipt of rents by the plaintiff or those under whom he claimed in respect of his 1-3rd since the expiration of the lease in 1818, nor

In 1818 the plaintiff and the defendant's grandfather became seised as tenants in common of a meadow. The meadow was then in the possession of the defendant's grandfather, who had previously held it under a lease. The plaintiff's father became possessed in 1826, and so continued till his death in 1836. In 1837 Newton, who was proved to be a land agent who received the defendant's rents and managed his property, wrote the following letter to the plaintiff's agent:—"Sir, —Mr. P. (the defendant) is now in possession of his

2-3rds of the meadow, who will no doubt accept a lease (three lives) for Ley's (the plaintiff's) 1-3rd at a fair rack rent. You must be aware Mr. P. is not bound to pay rent for Ley's 1-3rd during the time his father held the meadow, but no doubt he will do so in case you agree for a lease. Signed J. Newton. Will you favour me with the terms of a lease for the 1-3rd of the meadow that I may lay it before Mr. P." No answer was shewn to have been given to this letter, but the defendant continued in possession of the land down to 1857, when an action of ejectment was commenced. It was not shewn that either the defendant or his predecessors had paid any rent to the plaintiff since 1818. Newton was in Court, but not called as a witness by the defendant.—*Held*, that the letter was not a sufficient acknowledgment of the plaintiff's title within the 14th section of the 3 & 4 Wm. 4, c. 27.

*Held*, also, by *Bramwell*, B., *Watson*, B., and *Channell*, B., dissentiente *Martin*, B.—That the letter, coupled with the other facts, was not evidence from which the creation of a tenancy at will could be presumed.

*Quære*, whether the letter was admissible in evidence against the defendant.

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was there any evidence to shew under what circumstances the plaintiff's 1-3rd was occupied by Thomas or by the defendant's father; but it was shewn that, shortly after the expiration of the lease, a surveyor fixed a rent for the plaintiff's 1-3rd. The following letter was put in by the plaintiff in order to rebut the defence arising under the Statute of Limitations 3 & 4 Wm. 4, c. 27.

"Sir,—In reply to your queries respecting Ventongimps, I beg to inform you that Mr. Peter has sold his interest in that property to Mr. Hodge, of Truro, Saddler. Mr. J. T. H. Peter is now in possession of his 2-3rds of the meadow referred to by you, who will no doubt accept a lease (3 lives) for Ley's 1-3rd at a fair rack rent. You must be aware that Mr. Peter Junr. is not bound to pay rent for Ley's 1-3rd during the time his father held the meadow, but no doubt he will do so in case you agree for a lease. I have given your notice to Messrs. Jago, Geach, and Hoskin of your meeting on Saturday next the 17th instant.

"I am yours truly

"St. Agnes Villa, June 13, 1837.

"JOSEPH NEWTON.

"P. S. Will you favour me with the terms of your lease for the 1-3rd of the meadow that I may lay it before Mr. Peter, Junr."

The letter was addressed "to Mr. Millett." It was not proved that the defendant wrote or sent any answer, but in order to shew that the letter was admissible in evidence, Millett, who was the plaintiff's agent, was called as a witness. He proved that Newton received the rents for the defendant for many years; that he was an estate agent. The witness had communicated with Withyam and Newton respecting matters connected with the manor. He first saw Withyam and afterwards Newton. He had conversations with Newton respecting a mine sett at Chiverton. He met Newton on

the ground, only once. The sett was not granted. Newton appeared as the representative of the defendant and had conversations with the witness on the subject. They conversed as to a right of turbary on Hallett Down. Newton received rents at the courts and paid the defendant's proportion of the expenses. The witness met Newton on the ground about Hallett Down.—Newton was not called as a witness by the defendant, though present in Court. The learned Judge admitted the letter in evidence, and directed a verdict to be entered for the plaintiff; leave being reserved to the defendant to move to enter a verdict if the Court should think that there was no evidence to take the case out of the Statute of Limitations; the Court to determine the questions as to Newton's agency and the admissibility of the letter, and to be at liberty to draw any inferences of fact.

*M. Smith* having obtained a rule accordingly,

*Kinglake*, Serjt., and *Karslake* shewed cause in this Vacation, February 6th.

*M. Smith* and *Collier* were heard in support of the rule.—In addition to the cases mentioned in the judgment, *Hyde v. Johnson* (a) and *Doe d. Hull v. Wood* (b) were referred to.

*Cur. adv. vult.*

The learned Judges differing in opinion, the following judgments were now delivered.

MARTIN, B.—This is a rule to enter a verdict for the defendant, obtained by Mr. *M. Smith*, against which cause has been shewn.

It was an action of ejectment tried before my brother

(a) 2 Bing. N. C. 776.

(b) 14 M. & W. 682.

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*Crompton* at Bodmin, and, as to the part of the property in controversy in this rule, the defence was the Statute of Limitations, 3 & 4 Wm. 4, c. 27. The ejectment was brought in May, 1857. It appeared that the plaintiff claimed an undivided 1-3rd of a close of land called Barn Meadow. The close, with other land, had been demised by a lease, which expired in 1818, but Mr. Thomas, the lessee, continued to occupy it during his life, he being the owner of the other 2-3rds. After his death, Mr. Peter, the father of the defendant who had married Mr. Thomas's daughter, continued to occupy it until his death, which occurred some time in 1836, but the date of it was not proved; and, after his death, the present defendant, who is his son, seems to have entered into or continued in the possession of it. In order to take the case out of the Statute of Limitations, a letter, written by a Mr. Newton to the plaintiff, was offered in evidence, dated 13th June, 1837, within 20 years of the commencement of the action. It was as follows, so far as relates to the present question. —(His Lordship then read the letter.) Nothing was left to the jury; but it was referred to the Court to draw such inferences as they thought a jury ought to have drawn.

It was contended, first, that there was evidence that Mr. Newton was sufficiently connected with the defendant to make this letter evidence; and secondly, that if it was, it answered the Statute of Limitations in two ways: first, coupled with the other facts in the case, as being evidence of a tenancy at will created within the 20 years, and therefore within the 7th section; and secondly, as an acknowledgment of title within the 14th section.

It was contended on behalf of the defendant that the letter was not admissible in evidence at all against the defendant, and if it was, that it was no acknowledgment within the 14th section, not being signed by the defendant

himself. I concur with the rest of the Court in thinking that it is not a sufficient acknowledgment. I think this point has been already decided; and if the decisions upon similar clauses of other statutes be erroneous, the error must be set right in a Court of error. In the case cited *Lessee of The Corporation of Dublin v. Judge (a)*, I think the signature must be taken as the tenant's own, being written by her desire, in her presence, she being unable to write from illness.

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Secondly, it was contended that there was no evidence of a tenancy at will created within the 20 years. I am sorry to differ from the rest of the Court, but, assuming the letter to be evidence against the defendant, and the same as if written by himself, I am of opinion that there was evidence for the jury of a tenancy at will created within 20 years, and, had I been on the jury, I would have found a verdict accordingly.

The facts are these. The plaintiff was the admitted owner of the land. The father of the defendant had been tenant of it liable to a rent; he had died in 1836, and the defendant seems to have afterwards continued to occupy it: —(if he did not, and entered subsequently to the writing of the letter, the case would, in my opinion, be quite as strong, indeed stronger in favour of a tenancy at will). Upon the present assumption he wrote or caused to be written the letter of 13th June, 1837, offering to become tenant of it at a rent, and continued in possession, no answer being proved to have been sent to the letter. Now, to make a tenancy at will it is only necessary to shew that the occupier entered or continued in possession by the consent of the landlord at the occupier's request, or indeed by his own act: Littleton, s. 70, and Lord Coke's comment upon it, 57 a. And I think the true and

(a) 11 Irish Law Rep. 80; see *Ball v. Dunsterville*, 4 T. R. 313.

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legitimate conclusion from the above facts is, that in 1837 the defendant continued in possession, with the consent of the plaintiff, until some arrangement was made between them as to the amount of the rent. If after this letter, and no answer being sent to it, the defendant had sown the land, and the plaintiff had in the following year taken possession without allowing the defendant the benefit of the crops, I am satisfied there would have been evidence for a jury of a tenancy at will, and that a jury would have found, for the defendant, that there was such a tenancy, and that he was entitled to the emblements. If there was evidence of a tenancy in 1838 there is evidence in 1857 when the cause was tried.

The next question is, Was the letter evidence against the defendant? I own I entertain no doubt that it was; and it seems to me that the evidence on the point goes much beyond what it has been assumed to be by my learned brothers. There was evidence that Mr. Newton had the management of the plaintiff's property, or in other words was his land agent; there was no cross-examination upon this point, and it was proved that he was the present agent and manager of the defendant, and he was present in Court at the trial, and not called as a witness. I myself entertain no doubt whatever that there was evidence to go to the jury that the letter was written by an agent of the defendant, and was evidence against him. It is said that there was no evidence that he was an agent to take or hire land for the defendant. I do not think that that is the question. If the letter be evidence against the defendant, the facts stated in it, and the further fact of the continued occupation of the land by the defendant himself, in my opinion afford evidence of a tenancy at will, and I think this conclusion arises upon the actual facts, and not upon any authority of Mr. Newton to take or hire land.

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Then remains the question whether it makes any difference that the defendant was himself a tenant in common with the plaintiff of the property, and I think it does not, and that the question is the same as if the plaintiff had been sole owner. I therefore think the rule ought to be discharged. Further: if the decision turn upon the non-admissibility of the letter in evidence, I think there ought to be a new trial to give the opportunity of calling Mr. Newton, and ascertaining from him whether he wrote it without the authority of the defendant, to whom it was proved, by indisputable evidence, that he was land agent or steward.

BRAMWELL, B.—I am of opinion that this rule should be made absolute. We have already decided that the letter of Mr. Newton is not an acknowledgment sufficient to prevent the effect of the Statute of Limitations. The remaining question is whether there was evidence of a tenancy at will at the date of or subsequent to that letter; I am of opinion there was not. I think there is no evidence of any authority in Newton to make the suggested offer contained in that letter, nor, in the alternative, to make the defendant tenant at will to the plaintiff. Nor, if there were, do I conceive the letter to be more than an expression of an expectation: I doubt whether the letter was admissible in evidence. But assuming it was, and was evidence of the facts mentioned in it, and that it shewed the defendant was then in possession, I think there was no evidence of a tenancy at will. The facts would be that the defendant being in possession of the premises continued there more than 20 years uninterrupted by the plaintiff. I am of opinion this does not constitute a tenancy at will, nor is evidence of it. To constitute a tenancy at will, there must be a contract, the lessor must be bound as well as the lessee. Now, I see nothing in this to prevent the

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lessor from treating the defendant as a trespasser at any time from the date of that letter down to the bringing of this action. Indeed it does not appear there was any demand of possession or determination of a tenancy at will before the bringing of this action. Mere silence on the part of the plaintiff did not constitute or make evidence of a tenancy at will. If it did, when did the silence have that effect? At the end of a day—a week—a month—a year—or when? Where there is no duty to do anything, mere lapse of time and nothing done, is no evidence of anything. I do not dispute the authority of Littleton; on the contrary, I admit and rely on it. For it is clear that Littleton and his commentator alike suppose an affirmative consent and not a mere negative or silent consent: see *Mitcheson v. Oliver* (a). But further: to what, if anything, does the plaintiff consent? Not to a tenancy as offered. In fact, not to anything offered, but to the continuance of the state of things as they existed. What was that state of things. Why, the defendant is in possession and is receiving the profits. Now, to the defendant's continuing in possession, the plaintiff's consent is not necessary. Nor to his receiving the profits. It would be necessary to his receiving them and not accounting for them, or paying some rent for them; but no such consent as this is given. The above remarks assume that the defendant was in possession as though the title to the entirety was in the plaintiff. But in truth the defendant was as much entitled to the possession as the plaintiff; his occupation of the land was entirely lawful; he had no possession of the plaintiff's share other than what was unavoidable. There is in this case, therefore, a want of any evidence of contract on the part of the defendant. There is no estoppel on him to say his occupation was unlawful, and so to admit it was lawful, and

(a) 5 E. & B. 419.

so acknowledge a tenancy. The case is not in the dilemma that either he was wrongfully in occupation, or rightly by the will of the lessor. I think therefore there is no evidence that either plaintiff or defendant was party to a tenancy at will, or proposed tenancy at will. Upon no supposition was the defendant a trespasser. The case of *Henderson v. Eason* (a) in the Exchequer Chamber shews that account was not maintainable, and as use and occupation is an action of contract, that also was at no time maintainable.

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WATSON, B.—In this case, tried before *Crompton, J.*, at the last assizes for Cornwall, it appeared that the plaintiff was seized of an undivided 1-3rd part of a meadow, called "Barn Meadow." This one 1-3rd part had been held by one Thomas, the owner of the other undivided 2-3rds, under a lease made in 1765 and which expired in 1818. Thomas died in 1826. Peter, the father of the present defendant, succeeded, and at the time of his death was the owner of the 2-3rds; the defendant on the death of his father, in 1836, became entitled to the 2-3rds. He entered into possession thereof and so has remained to the present time. No evidence was given to shew any possession or receipt of rents of this 1-3rd since the expiration of the lease in 1818, by the plaintiff or by those under whom he claims. No evidence respecting this 1-3rd, to shew under what circumstances it was occupied if at all by Thomas, and by defendant's father, or by the defendant, was given; therefore it is clear that, but for the letter hereinafter mentioned, the plaintiff's claim would be barred by the operation of the Limitation Act, 3 & 4 Wm. 4, c. 27, ss. 2 and 12: see *Culley v. Taylerson* (b). The letter was received in evidence by the learned Judge, reserving for

(a) 17 Q. B. 701.

(b) 11 A. &amp; E. 1008.

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the opinion of the Court the questions of the admissibility and effect of such letter. The first question is, was that letter receivable in evidence? The letter was in these terms—(His Lordship read the letter).

To shew that it was receivable in evidence Mr. Millett was called, to whom the letter was directed, who proved that Newton (the writer of the letter) received the rents for Peter for many years, that he was an estate agent; witness had communicated with Newton as to matters connected with the manor and first saw Withyam and afterwards Newton, and had conversations with Newton as to a mine sett at Chiverton, and met Newton on the ground—only once: the sett was not granted: he appeared as representative of Peter, and had conversations with him on the subject: he conversed as to a right of turbary over Hallett Down. Newton received rents at the courts and paid Peter's proportions of the expenses. He met Newton on the ground about Hallett Down.

Upon these facts I am of opinion that no evidence was given to prove Peter's authority to Newton to write this letter. No express authority was proved; no evidence given that the defendant ever heard of, or had any knowledge, or ever acted upon or recognised this letter. Then, was there any thing to shew that writing this letter by Newton was within the general scope of his authority? Newton was an estate agent, and received the rent for the defendant; and received rents at the manor court, and paid the expenses of the defendant there. There is certainly no authority in a receiver of rents to make admissions. Throughout the country landowners are in the habit of employing estate agents and others to receive their rents, and to conduct such farming operations as repairing, draining, cutting timber and the like; but such an employment would not enable that agent without express authority to make

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admissions in writing or otherwise as to his employer's title, or to bind him by proposals to purchase, or take on lease, the lands of another. To hold otherwise would be to place landowners at the mercy of their receivers or farm agents. Even an attorney employed in a matter of business is not an agent to make admissions for his client except after action commenced and in matters relating to that action: *Wagstaff v. Watson (a)*. And as to Newton negotiating respecting some right of turbary on behalf of the defendant, it is impossible to say that this would authorize him at any future time to make statements as to title, or to make an offer for the purchase of land.

Moreover, it is for the Judge to look at the letter to see whether it professes to be written by an agent, and by the authority of the defendant. It does not purport to be written by the defendant's sanction, or authority, but merely asking Millett whether a lease would be granted, defendant being in possession of 2-3rds, who, as he says, no doubt will accept a lease, and no doubt would pay rent for the past.

But assuming the letter admissible, what effect has it? It is clear—indeed all but admitted in argument—that it was not an admission of title to avoid the Statute of Limitations, within the 14th section of the 3 & 4 Wm. 4, c. 27, for such an acknowledgment must be signed by the person in possession, and an acknowledgment of title in writing, signed by an agent, is not sufficient for that purpose. By giving effect to the letter, we should truly admit it as an admission of title when not properly signed. But it was contended that the letter itself, not answered or in any wise recognised by, or even known to the plaintiff, was evidence of a tenancy at will, and if so, the tenancy at will was determined at the death of Thomas and of the

(a) 4 B. & Ad. 339.



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defendant's father, and that a fresh tenancy at will was created at the time of and by the act of writing the letter. I think not. A tenancy at will, like any other tenancy, must be created by the agreement of the parties, or it may arise from the relation of the parties, where there is a will on both sides, that one should hold the land of another, as in *Littleton*, s. 70:—"Also if a man make a deed of feoffment to another of lands and deliver to him the deed, but not have livery of seisin, in this case he to whom the deed was delivered may enter into the land and occupy it at the will of him who made the deed." So, where a purchaser of land before conveyance executed enters, &c., he is tenant at will to the intended vendor: *Doe v. Chamberlain* (a). In either case the feoffee or the purchaser holds the lands at the will of the feoffor or vendor. And also when one person occupies the land of another by his express permission, without payment of rent, he is a strict tenant at will. Here, the letter does not shew that either Thomas or Peter, the defendant's father, or the defendant, occupied the plaintiff's 1-3rd part by the permission of the plaintiff; but merely that they occupied their own 2-3rds, subject to an action of account to the plaintiff for his 1-3rd, if they received more than their shares: *Henderson v. Eason* (b). But was this letter proof of a tenancy at will before or after the letter was written? Nothing was said or done on either side to create such a tenancy. The defendant was not let into possession of the plaintiff's 1-3rd, nor was there any negotiation for the lease. In the case of *Doe d. Bennett v. Turner* (c), where a tenancy at will was determined by the entry of the lessor, after which the tenant remained in possession, *Parke, B.*, in delivering the judgment of the Court, says, that "after the will determined

(a) 5 M. &amp; W. 14.

(b) 17 Q. B. 701.

(c) 7 M. &amp; W. 226; see p. 233.

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the defendant became tenant at sufferance, and such tenancy at sufferance would continue until the parties created a new tenancy at will by fresh agreement between them express or implied;" and he says slight evidence would satisfy the jury for that purpose. On the second trial of the same case, *Turner v. Doe d. Bennett (c)*, to prove a fresh tenancy at will, it was shewn that after the termination of the will the defendant signed an assessment, stating himself to be tenant of the farm and the lessor of the plaintiff to be proprietor, and from this it was left to the jury to infer and they found that there was a fresh tenancy at will. Here there is no act done by either party, except Mr. Newton expressing in his letter that the defendant was in possession of 2-3rds, and that he might take a lease for lives of the other 1-3rd. Mr. Newton says, that no doubt defendant will pay rent for plaintiff's 1-3rd during his (defendant's) lease, but not during his father's, from which I should infer that he meant a payment to the extent he might be bound to pay in an action of account. Even if the terms of the letter are construed strictly as admitting a liability for "rent," payable by the father and the defendant, that rent could only be created by some agreement, express or implied, to pay rent since the expiration of the lease of 1765, and that would be evidence, not of a tenancy at will but of a tenancy from year to year. And whether that tenancy from year to year arose when Thomas's lease expired or after Thomas's death, when Peter, the father, became possessed, there has been a tenancy from year to year for above 21 years; and as no rent has been paid within 21 years since its commencement, the plaintiff would be barred by the 8th section of the 3 & 4 Wm. 4, c. 27. On all these grounds I am of opinion that the

(a) 9 M. &amp; W. 643.

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plaintiff's claim is barred, and that there should be a verdict entered for the defendant in pursuance of the leave reserved at the trial.

CHANNELL, B.—In this case I have had the advantage of reading the opinions of my brothers *Martin*, *Bramwell* and *Watson*. I think it unnecessary to repeat the statement of facts already given. On one point we are all agreed, and we expressed our opinions in the course of the argument, viz., that the letter of Mr. Newton of the 13th of June, 1837, was not a sufficient acknowledgment to take the case out of the Statute of Limitations. On the other points that arise in the case, I regret that a difference of opinion exists. I participate in the doubt expressed by my brother *Bramwell* whether the letter of Mr. Newton was admissible in evidence. Power is given to the Court to draw such inferences as a jury might have drawn; but I do not see my way to the conclusion that Newton had authority to bind the defendant, supposing the letter to amount to an actual offer. But it seems to me only to express the writer's expectation and belief of what the defendant probably would do. I agree that the letter does not amount to an offer, and that the supposed agent does not profess to make one. If he did, it was an offer on the part of the defendant to take a lease of Ley's 1-3rd at a fair rack rent accompanied by the expression of an opinion that, if a lease could be agreed upon, the defendant would probably pay rent for the period of his father's occupation. Assuming that the letter goes beyond the expression of the writer's opinion, and amounts to an offer, it is not, I think, an offer on the part of principal to become tenant at will. Supposing it to be such an offer, it is not disputed that a tenancy at will must be created

by contract of some kind. It is said that the continuance of the defendant's possession after the letter and his perception of the whole profits must be taken to have been with the acquiescence of the plaintiff, and that such acquiescence would be evidence from which the Court might draw the inference of a tenancy at will. But the situation of the parties must be borne in mind. Had the plaintiff been sole owner of the land and the defendant's possession that of a trespasser, unless it could be referred to some tenancy under the plaintiff, the case would have been different. A letter similar in terms, but omitting, of course, all reference to the 2-3rds and 1-3rd, might, followed by possession, have been evidence of a tenancy. Here the defendant was seised as tenant in common of two undivided thirds of Barn Meadow, and the possession of the land was perfectly lawful. It has I think been rightly asked—"If there was a tenancy at will, when did it commence?" What was there to bind the *lessor*, and when was he bound? I agree with my brothers *Bramwell* and *Watson* in their view of the law, and as to the right inferences of fact to be drawn from the evidence; and I am consequently of opinion that, as regards Barn Meadow, the rule to enter a verdict should be made absolute.

Rule absolute to enter a verdict  
for the defendant as regards  
Barn Meadow (a).

(a) See *Doe d. Goody v. Carter*, 9 Q. B. 863; *Doe d. The Birmingham Canal Company v. Bold*, 11 Q. B. 127.

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Feb. 26.

LUCAS v. TARLETON.

In an action for selling goods distrained before the expiration of five days, the plaintiff is not entitled to a verdict unless he proves actual damage.

*Quære*, whether under a count for taking an excessive distress under the statute of Marlbridge, the plaintiff can shew that the amount of rent due was less than that distrained for.

In an action for an excessive distress not averring that the sum distrained for was not due, with a count for selling before the expiration of five days, the plaintiff at the trial applied to amend by adding a count for distraining and selling goods to satisfy more rent than was due. The Judge refused to allow the amendment on the ground that it was not a matter in dispute at the time of the commencement of the action.—*Held*, that the amendment was properly disallowed.

THE first count of the declaration stated that, before and at the time of the grievances, &c., a messuage and land at &c. were held and occupied by virtue of a certain tenancy under the defendant, at and under a certain rent, and the defendant distrained the plaintiff's goods, that is to say, (enumerating them), being in and upon the said house and land, for certain arrears of the said rent. Yet the defendant wrongfully, and contrary to the statute in such case made, sold the said goods under the said distress towards satisfaction of the said rent for which they had been distrained, and the charges of the said distress, appraisement and sale, without having left at the chief mansion house, or other most notorious place of the said premises charged with the said rent distrained for, any notice of the said distress and of the cause of such taking, five clear days before the appraisement and sale of the said goods, as required by the said statutes, and wrongfully sold the said goods as aforesaid before the expiration of five days after the said distress taken and notice thereof left at the chief mansion house or other most notorious place on the said premises, contrary to the said statute.—Second count: that before the grievances &c., a messuage and land at &c. were held and occupied by virtue of a certain tenancy under the defendant, at and under a certain rent payable to the defendant (a), and the

(a) The ordinary count for taking an excessive distress under the

statute of Marlbridge contains an averment which was omitted here,

defendant distrained for certain rent then due to him for and in respect of the said messuage and land, the plaintiff's goods, that is to say (enumerating them), the same being of much greater value than the said rent then due to the defendant and the charges of the said distress and appraisement and sale thereof, when at the time of taking the said distress a small part of the said goods was of sufficient value to satisfy the said rent and charges, and the defendant thereby took an excessive and unreasonable distress for the said rent, contrary to the statute.

Plea: Not guilty (by stat. 11 Geo. 2, c. 19, s. 21).—Whereupon issue was joined.

At the trial, before *Cresswell, J.*, at the last Warwickshire Summer Assizes, it was proved that the plaintiff and his son W. Lucas were tenants of a farm under the defendant. Rent being in arrear the defendant distrained, and notice of distress was served on the 13th of October. The sale under the distress took place on Saturday the 18th of October at 11 or 12 o'clock (a); but there was no evidence that the plaintiff had sustained any damage by reason of the sale taking place on that day instead of the Monday following. Goods were sold sufficient to realize 96*l.* 19*s.* 5*d.*, the amount distrained for being rent 80*l.* and costs 14*l.* 6*s.* 6*d.*, making 94*l.* 6*s.* 6*d.* The plaintiff's witnesses stated that the rent was only 70*l.*, 7*l.* of which had been paid. At the conclusion of the plaintiff's case, the defendant's counsel submitted that as no actual damage had been sustained in consequence of the sale on the Saturday, the defendant was entitled to a verdict. The learned Judge was of that

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that "at the time of the grievance, &c., a certain small sum of money, to wit, the sum of £ , and no more, was due and in arrear from the plaintiff." See 2 Chitty on

Pleading, p. 537, 7th ed.; *Thompson v. Wood*, 4 Q. B. 493.

(a) See *Robinson v. Waddington*, 13 Q. B. 753, overruling *Wallace v. King*, 1 H. Bl. 13.

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opinion. The plaintiff's counsel then applied to add a count for distraining and selling goods to satisfy a larger amount of rent than that actually due; but the learned Judge refused to permit the amendment on the ground that this was not a matter in controversy at the time of the commencement of the action, and he directed a verdict to be entered for the defendant.

*Macaulay*, in Michaelmas Term, obtained a rule for a new trial on the grounds, that the Judge misdirected the jury in telling them that the plaintiff was not entitled to recover any damages, and that the second count did not entitle the plaintiff to claim damages as for the taking and distraining a larger quantity of goods than were necessary to satisfy the rent due together with the costs of the distress; and that the verdict was contrary to the evidence.

*Hayes*, Serjt., and *Field* shewed cause (a).—The plaintiff was not entitled to a verdict on the first count, because he proved no damage: 11 Geo. 2, c. 19, s. 19. In *Rodgers v. Parker* (b) growing wheat was distrained and sold, the rule as to growing crops being, that they may be seized but must be kept till they are fit to be cut and then sold, the jury having found that no damage had been sustained by the plaintiff, it was held that he was not entitled to a verdict for nominal damages. That case is stronger than the present, because if the sale had been deferred till the crops were ripe there would have been a long time during which the defendant might have replevied or raised money to pay the rent.—The second count is not applicable to the facts which the plaintiff attempted to prove at the trial. There should have been a count averring that the rent distrained for was

(a) Feb. 6. Before *Watson*, B., and *Channell*, B.

(b) 18 C. B. 112.

not due, and charging the defendant with distraining and selling goods to an amount unreasonable in respect of the amount which was actually due.

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*Macaulay* and *Bittleston*, in support of the rule.—As to the first point: the sale on Saturday deprived the plaintiff of two days during which he might have replevied or raised the money. The distress being wrongful, the plaintiff is at least entitled to the difference between the value of the goods and the amount of the sum distrained for. There was nothing to lead to the presumption that the plaintiff would not have replevied. The question of damage should have been left to the jury as was done in *Rodgers v. Parker* (a). The learned Judge assumed that the second count was similar to that in *Leyland v. Tancred* (b), but it is not so. [*Channell*, B.—If the learned Judge ruled that the second count disclosed no cause of action, that was a misdirection. But if he said that upon the second count the plaintiff was bound by the admission that the rent distrained for was due, and that therefore the distress was not excessive, he was probably right.] The plaintiff was at liberty to shew what rent was really due. In *Crowder v. Self* (c), which was an action for an excessive distress, Lord *Abinger* told the jury that the question was, “whether, notwithstanding the sum of 6*l.* occurring in the warrant, the goods actually seized were more than sufficient to satisfy a distress for 4*l.*,” the amount really due. In *Sells v. Hoare* (d), it is said that the substantial allegation in an action for an excessive distress is, that more was distrained for than was actually due. A distress is excessive if it is unreasonable and excessive in respect of what is really

(a) 18 C. B. 112.

(b) 16 Q. B. 664.

(c) 2 Moo. & Rob. 190.

(d) 1 Bing. 401.



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due. Since the case of *Tancred v. Leyland* (a), it cannot be held that, in an action for taking an excessive distress, the plaintiff cannot adduce evidence that a less sum than that distrained for was due.—They referred also to *French v. Philips* (b).

*Cur. adv. vult.*

The judgment of the Court was now delivered by

WATSON, B.—This case was tried before my brother *Cresswell* at the last assizes for Warwickshire. At the trial it appeared that the declaration contained two counts: the first for selling goods distrained for rent within five days: the second count was for an excessive distress. At the trial it was proved that the goods were sold a day too soon; but there was no evidence to shew that the defendant had sustained any damage thereby; upon which the learned Judge directed a verdict for the defendant. Upon this point we think that the learned Judge was right, and we consider *Rodgers v. Parker* (c) an authority in point. On the other count the Judge reports to us that upon his so ruling Mr. *Macaulay* applied to amend the declaration by inserting a count for distraining and selling goods to a greater amount than the rent due, which the Judge, after consultation with *Erle, J.*, refused to allow, on the ground that this matter was not in dispute at the commencement of the action. In this ruling we concur, for such ruling is in accordance with the judgment of the Court of Common Pleas in the case of *Wilkin v. Reed* (d).

But Mr. *Macaulay* applied to us for a new trial, on the ground that the Judge had said that the last count was bad,

(a) 16 Q. B. 669.

(b) 1 H. & N. 364.

(c) 18 C. B. 112.

(d) 15 C. B. 192.

as it was erroneously supposed that it was a count for distraining for more rent than was due without an allegation of special damage (a); the learned counsel for the plaintiff also contended before us, that under the common count for an excessive distress (b) under the statute of Marlbridge, the plaintiff might shew that the defendant had distrained for more rent than was due in order to shew that the distress was excessive. How that may be, we do not feel ourselves called upon to pronounce any opinion in the present case, for we have communicated with the learned Judge and although he does not recollect any such expression as to the validity of the count, it is clear to us that he was never requested to leave any question of fact to the jury, nor was he requested to determine in point of law what was the effect of this count as regards the facts proved. In this state of the case we might discharge the rule, but we think that instead of discharging the rule, the plaintiff may be let in to try this action again if he thinks it worth his while, but it must be on payment of the costs of the first trial and of this rule within ten days. If these costs are paid within that time the rule will be absolute for a new trial; otherwise the rule must be discharged.

Rule accordingly.

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(a) *Leyland v. Tancred*, 16 Q. B. 664; *Stevenson v. Newnam*, 13 C. B. 285; *Glyn v. Thomas*, 11 Exch. 870. (b) *Pigott v. Birtles*, 1 M. & W. 441; *Thompson v. Wood*, 4 Q. B. 493.



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Feb. 6.

GURNEY v. JOHN EVANS and JOHN EVANS the Younger.

Goods having been ordered by E. were invoiced to "E. and Son," and a bill was drawn for the price on "E. and Son." The bill was accepted in the handwriting of the son, in name of E. and son. The son was not a partner and it was alleged that he accepted the bill only as his father's amanuensis. — *Held*, that if the son had so conducted himself that the drawer of the bill might reasonably have believed and did believe that he was a partner, he was liable on the bill.

THE declaration stated, that the plaintiff on, &c., sued out of Her Majesty's Court of Exchequer of Pleas, a writ of summons against John Evans and John Evans the younger, in the special form contained in Schedule A. to The Summary Procedure on Bills of Exchange Act, 1855, and indorsed as follows (setting out the indorsement). And the plaintiff suggests and gives the Court here to understand and be informed that the said John Evans has not appeared to the said writ, and that judgment has been signed and obtained against him herein.—And the plaintiff, by &c., his attorney, declares against John Evans the younger, that the plaintiff on, &c., by his bill of exchange now overdue, directed to the defendants, required the defendants to pay to the order of the plaintiff 94*l*, six months after date, and the defendants accepted the said bill, but have not paid the same.

Plea by the defendant John Evans the younger, that he did not accept the said bill.—Whereupon issue was joined.

At the trial before *Coleridge, J.*, at the Bristol Summer Assizes, 1857, it was proved that the plaintiff, a timber merchant, carrying on business in London, being at Aberystwith in October, 1856, applied to Evans the father, who was a shipbuilder, for an order for some oak timber. The father would not give an order without consulting his son, but the father, the son, and the plaintiff having subsequently met, on the 13th of October the father wrote an order for the timber. The timber was invoiced to J. Evans and Son, and the bill on which the action was brought was drawn upon J. Evans and Son, and was accepted in the handwriting of the son. On the 25th of November, the plaintiff received a letter containing these expressions:—"The planks have not yet arrived; but the little I saw of them at

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Newport, on board the boat, I think they will do. I enclose my acceptance, &c.," signed J. Evans. This letter was in the handwriting of the son. The plaintiff acknowledged the acceptance, addressing his letter to J. Evans. He then wrote for further orders, addressing his letter to J. Evans and Son, and eventually sent a further supply of timber, to the amount of 221*l*., for which he drew a bill on J. Evans and Son. Some of this timber having been lost on the journey, the father sent two acceptances of his own for 100*l*. and 105*l*., but did not return the draft on J. Evans and Son for 221*l*. The plaintiff then wrote, alleging that he had shipped the full quantity of timber, and saying, "I thought your firm was J. Evans and Son: is it not so?" The son, writing in the name of the father, answered the letter; but the answer did not explain that the son was not a partner. The father afterwards compounded with his creditors. The plaintiff said that he believed that the son was a partner, and that he was never undeceived until the meeting of creditors. On behalf of the defendant J. Evans the younger, it was proved that there was no partnership between him and his father: that the timber was in fact ordered by and for J. Evans the father, and that the son had signed the bills, and written the letters at the request of his father, who, in consequence of an accident, was unable to write. To explain the fact that the first bill on J. Evans and Son was not returned, it was said that the stamp would have been spoiled.

The plaintiff's counsel contended, that J. Evans the younger was estopped from denying his acceptance. The learned Judge told the jury that he did not think that the plaintiff intended to draw upon the son, except upon the supposition that he was a partner; and that if the plaintiff intended to draw upon the partnership only, they might find for the defendant. The jury thereupon found a verdict for the defendant.

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*Prideaux*, in last Michaelmas Term, obtained a rule for a new trial, on the ground that the Judge misdirected the jury in telling them that if they thought that the plaintiff only drew on the son on the supposition that he was a partner, and that he intended only to draw on the party whose business it was, and that the son, by mistake, accepted for the father in the name of Evans and Son, they were to find for the defendant: also on the ground that the son was estopped from denying his acceptance, and that the verdict was against evidence, the evidence clearly shewing that the son had held himself out as a partner or co-contractor: against which,

*Karslake* now shewed cause.

BRAMWELL, B.—I am of opinion that this rule must be absolute. It is clear that there was evidence that the son so conducted himself that the plaintiff might have reasonably believed that he was one of the purchasers of the timber, and that the plaintiff did so believe. If so, the son would have been liable for the price of the timber, and on the same principle he is liable on this bill. What was left to the jury was, not what was the operation of the conduct of the defendant upon the plaintiffs' mind, but what was in the mind of the defendant.

WATSON, B.—The proper question was not left to the jury in this case; they should have been asked whether the conduct or statements of the defendant J. Evans the younger led the plaintiff to believe that the defendant and his father were in partnership, and whether the plaintiff acted on that belief. The plaintiff said that he did believe it. The statement of the defendant was, that the invoice was sent to Evans and Son. The defendant received it: he never returned it, or said it was a mistake. A bill was then drawn on Evans and Son. The father being

present, the defendant, the son, accepted it in that form; the father saying that otherwise the stamp would have been spoiled. There was a second sale of timber, invoiced in like manner, to J. Evans and Son, in respect of which a bill was drawn on J. Evans and Son, and a correspondence, and still no denial by the son that he was a partner. These facts furnished evidence that the defendants had held themselves out as partners, which ought to have been submitted to the jury.

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CHANNELL, B.—I concur in thinking that this rule must be absolute for a new trial. The plaintiff had a right to have the question left to the jury, whether the defendant held himself out as a partner.

Rule absolute.

#### THE ATTORNEY GENERAL v. LORD MIDDLETON.

Feb. 9 & 10.

INFORMATION by the Attorney General as follows:—

1. The object of this information is to obtain payment of the duty, which has become payable to Her Majesty in respect of the succession of the defendant, who is the eighth Baron Middleton, to certain real property, formerly belonging to Henry, sixth Baron Middleton deceased, hereinafter referred to as "the testator."

2. The testator was, at the time of making his will and of his death, absolutely beneficially seised and entitled, for an estate of inheritance in fee simple, of and to certain real property, such as in The Succession Duty Act 1853 is mentioned, being the manors, hereditaments and real estate

A testator devised his real estate to D. for life, and after D.'s decease to his eldest and other sons in tail male: and in default of such issue to H. for life, and after his decease to the eldest son of H. for life, with remainders over. The testator died in June, 1835, leaving D. and H., and the defendant

(the eldest son of H.), him surviving. H. died in November 1849, leaving the defendant him surviving. On the 19th of May, 1853, "The Succession Duty Act, 1853," came into operation. In November 1856, D. died, whereupon the defendant succeeded to the estate under the testator's will.—Held, that the defendant was chargeable with duty under the 2nd section of "The Succession Duty Act, 1853."

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particularly described in his will, and thereby devised as hereinafter stated, or otherwise had full power to appoint and dispose of the same by will; and, on the 18th of June, 1834, the testator made his last will and testament in writing, of that date, which was duly executed and attested as was then by law required for the devise of freehold estates; and thereby, amongst other things (to which it is unnecessary for the purposes of this suit more fully to refer), he gave his wife Jane Lady Middleton a life estate in his mansion house at Langford in the county of Nottingham, and in 100 acres of land adjoining thereto, and devised the same at her decease to the uses to which he had therein-after devised the residue of his Langford estate; and the rest of the said will (so far as it necessary for the purposes of this suit to state the same) is in the following terms, that is to say:—"I give and devise all my freehold manors, mansion houses, messuages or tenements, advowsons, farms, lands, tithes, collieries, hereditaments and real estate, situate, standing, lying, arising, or being at Langford aforesaid, and at Wollaton Trowell and Lenton, in the said county of Nottingham, and at Stapleford, and at Carlton in Moorland aforesaid, and at Middleton, in the said county of Warwick, and their rights, members and appurtenances, and all other the freehold hereditaments and real estate, if any, situate and being in the said counties of Nottingham, Lincoln and Warwick, or any of them, of or to which I, or any person or persons in trust for me, am, is, or are seised, or entitled, for an estate of inheritance in possession, reversion, remainder or expectancy, or which I have any power to appoint or dispose of by this my will, with their and every of their rights, members and appurtenances, &c., (then followed certain exceptions, including the mansion house, lands and hereditaments at Langford), To the use of my cousin the said Digby Willoughby and his assigns during

his life, without impeachment of waste; and after his decease, to the use of the eldest and every subsequently born son of the said Digby Willoughby who shall be born in my lifetime, and his assigns, severally and successively, according to his respective seniority, during his life, without impeachment of waste; and after his respective decease, to the use of the respective first, and every other son of such eldest and subsequently born sons as last aforesaid, severally and successively, according to his respective seniority, in tail male; but so that the respective son, or sons of the elder of such eldest and subsequently born sons (if more than one), and his and their issue male, shall always take before, and be preferred to the respective son or sons of the younger of such subsequently born sons, and his, and their issue male; and in default of such issue, to the use of every son of the said Digby Willoughby who shall be born after my decease, severally and successively, according to his respective seniority in tail male. And in default of such issue, to the use of Henry Willoughby and his assigns during his life, without impeachment of waste; and after his decease, to the use of the eldest son of the said Henry Willoughby and his assigns, during his life, without impeachment of waste:" with divers remainders over, as by the said will or an office copy of or extract from the same or the probate thereof when produced will appear.

3. The testator died on the 6th of June, 1835, without having altered, or revoked the disposition of his said real property made by his will as before stated, and he left the said Digby Willoughby and Henry Willoughby, in his said will named, who were respectively his first cousins, and also the above named defendant, who was the eldest son of the said Henry Willoughby, him surviving. And upon the testator's death, his cousin Digby Willoughby succeeded to the title, and became the seventh Baron Middleton, and he

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also succeeded to the said real property as tenant for life thereof in possession, under the disposition thereof made by the testator's will as before stated.

4. The testator's other cousin Henry Willoughby died on the 18th of November, 1849, leaving the above named defendant his eldest son him surviving.

5. Afterwards and during the continuance of the disposition made of the said real property by the said will as before stated, and after the 19th of May, 1853, being the time appointed for the commencement of the Succession Duty Act, 1853, that is to say, on the 5th of November, 1856, the said Digby Willoughby Baron Middleton died; and upon his death the above named defendant succeeded to the title, and became the eighth Baron Middleton, and also succeeded to the said real property, as tenant for life thereof in possession under the disposition thereof made by the testator's will as before stated.

6. The defendant is a descendant of a brother of the testator's father, and the Attorney General says, on behalf of her Majesty, that the defendant is liable to pay duty, in respect of his succession to the said real property, after the rate of 5*l.* per cent. per annum, upon the value thereof. But the defendant declines to pay any duty whatever in respect of the same, and wholly denies his liability so to do.

The information concluded with the following prayer by the Attorney General:—

1. That the defendant may answer the premises and matters aforesaid.

2. That it may be declared that the defendant is chargeable with duty after the rate of 5*l.* per cent. or at some other rate in respect of his succession to the real property devised by the will of the said testator as hereinbefore stated; and that the particulars of such succession and the

amount of duty payable by him in respect thereof may be ascertained (if necessary) under the direction of the Court, and that the defendant may be decreed to pay such duty to the Receiver General of the Inland Revenue on behalf of her Majesty, and that for the purposes aforesaid all proper accounts and inquiries may be taken and made, the Attorney General, on behalf of her Majesty, waiving all pains, penalties and forfeitures which may have been incurred by the defendant, by reason of his neglect to give such notice, or to deliver such account as by The Succession Duty Act, 1853, is required in that behalf, or otherwise howsoever in regard to the said succession.

3. That the Attorney General, on behalf of her Majesty, may have such further or other relief as the nature of the case may require.

To this information a general demurrer was filed.

*Wilde, C. Pollock and Parke*, for the defendant (a).—The question is whether The Succession Duty Act, 1853, is intended to operate on estates created and which had become vested in interest before the Act came into operation, in cases where such estates do not become vested in possession until afterwards; or whether it is confined to estates created under instruments made or taking effect after the passing of the Act. [*Watson, B.*—This point, though not argued, was considered and decided by this Court in the case of *The Attorney General v. Fitzjohn* (b).] The Act passed on the 4th August, 1853. The 54th

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(a) At the conclusion of *Wilde's* argument, *Hanson*, for the Crown, asked whether more counsel than one on each side would be heard as this was a demurrer. The Court however, referring to *The Attorney General v. Halling*, 15

M. & W. 687, said that as this was a proceeding on the equity side of the Court all the counsel on each side had a right to be heard.

(b) 2 H. & N. 465.

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section makes it retrospective, so as to come into operation on the 19th of May, 1853. The 2nd section enacts that "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, &c. shall be deemed to have conferred on the person entitled by reason of any such disposition 'a succession:' and the term 'successor' shall denote the person so entitled." The words "shall become entitled" may be construed "shall have achieved or acquired a title." If a person makes his will, as soon as he dies every person who takes a beneficial interest under the will, whether in possession or reversion, becomes "entitled" immediately upon the death of the testator. The scheme of the Act is that the person shall be called a successor as soon as he becomes "entitled," and that the duty shall be paid when the property falls into possession. The object was to create a class of taxable persons. The dispositions by which this class is to be created must be dispositions coming into operation after the passing of the Act. To give that construction to the Act is to read it in accordance with the ordinary rules governing the interpretation of statutes, and with reference to what must be presumed to have been the intention of the legislature. In the present case upon the death of the testator in 1835, the tenant for life became entitled to an estate for life in possession, and the defendant then became entitled to an estate in remainder; and therefore, as he became entitled upon a death anterior to the Act, his position is not affected by the circumstance that the tenant for life died subsequently to the Act. In no case is a successor constituted unless he becomes entitled in the sense of acquiring the inception of right upon a death happening after the commencement of the

Act. Looking at the whole scheme and policy of the Act, and particularly to the 2nd section which defines the term "successor," and the 20th section which regulates the period of payment, the manifest intention was that "succession" should be constituted by inception of right, and that liability to payment should be constituted by possession perfecting that right. [*Pollock*, C. B.—Is it contended that if under a marriage settlement, made twenty years before the passing of the Act, children took vested interests which do not come into possession till the death of the parents after the commencement of the Act, that duty would not be payable in respect of such successions?] At first sight it might seem to have been the better plan to have made possessory right, that is the transmission of enjoyment, the test of possession; but, on reflection, it will appear that the plan adopted is the most scientific and proper, because, inasmuch as the acquisition of right must always precede, or at all events be contemporaneous with the acquisition of possession, wherever the Act attaches upon the right it must attach upon the possession also. The words "or to the income thereof" are not intended to apply to property to which a person was previously entitled; they are meant to apply to cases in which the successor is only entitled to the income or mere usufruct, as distinguished from the corpus of the property. The words "either immediately or after any interval, either certainly or contingently," shew that the words "beneficially entitled" are intended to apply to those cases only where the party becomes entitled to the possession. The word "beneficially" is used in contradistinction to "fiduciary," that is, where a person does not become entitled in his own right. That is evident from the language of the latter clause of the 2nd section, "every devolution by law of any beneficial interest in property in possession

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or expectancy." The word "entitled" means entitled in the sense of inception of right. The words "upon the death" must be read in connection with "become entitled." A parallel phrase occurs in the second branch of the section, viz., "devolution by law upon the death of any person." It is difficult to suggest what words could be imported before "upon": it would not be correct to say, "expectant upon." The legislature well knew the meaning of the word "expectant," and has used it in the latter part of the 2nd section, and in the 7th, 14th and 15th sections, and has omitted it in the former part of the 2nd section, where they intended to make the inception of right the criterion of succession. [*Bramwell*, B.—The words are, "every past disposition by reason whereof any person has become entitled: the construction contended for gives no meaning to the word "has."] The word "has" may refer to a disposition taking effect after the 19th of May, and before the 4th of August, 1853. Since the Act takes effect at a date anterior to its passing, there would have been a culpable omission on the face of it if the word "past" had not been inserted. The language of the Act having reference to the date of its passing, it properly says every past or future disposition of property." [*Pollock*, C. B.—According to that argument, the language should have been, "shall or has since the 19th of May become beneficially entitled."] Suppose a testator died in the year 1800, having, by his will, devised certain property to A. for life, with remainder to B. for life, with remainder to the right heirs of a living person, or to the eldest son of B. who should be living at his death, or any class of persons to be ascertained at his death; in those cases, if B. died after the commencement of the Act, there would be a past disposition by which a person became entitled upon the death of another after the Act; and the duty would be payable, because there was not only no vested interest, but the person or class could

not be ascertained until the death of the tenant for life. [*Bramwell*, B.—It would be the same if the word “has” was left out of the section. If any meaning is given to that word, why should a person, who has become entitled contingently, be liable to duty, and a person who has become entitled absolutely, not liable?] This being an Act imposing a tax, unless the words are clear it should be construed in favour of the subject. The second branch of the 2nd section provides, that “every devolution by law of any beneficial interest in property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred a succession.” Suppose a person entitled to a reversion died intestate before the Act came into operation, his heir would not be a “successor” liable to duty, because he was entitled by devolution of law before the Act. [*Bramwell*, B.—The state of things supposed would not ordinarily exist unless there had been a previous disposition. In such case the heir would not take by devolution of law simply. But you would suggest that the ancestor may have granted a life estate, and died possessed of the reversion in fee.] In that case the heir would take the reversion by devolution of law. A decision in favour of the Crown will give effect to an apparent inconsistency and repugnancy on the face of the section between successors constituted by “disposition” and successors constituted by “devolution.” For instance, assuming that in the case of a “disposition” like this, the person entitled in remainder is liable to duty, if the tenant for life dies after the Act, though the testator died before it, yet if the testator died before the Act, having by his will devised to A. for life, with remainder to B. in fee, and B. dies in the testator’s lifetime, whereby the disposition in his favour lapses, and A. dies after the Act, could it be said that

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the heir at law of the testator was a successor by devolution within the meaning of the second branch of the 2nd section? There can be no devolution by law to an heir at law, except in relation to the death of the intestate: the devolution is only by reason of there being an intestacy. If the rule sought to be applied to the case of dispositions were the true rule, one might expect to find the same rule applied with respect to devolution by law. [*The Attorney General* referred to the 5th section. *Pollock, C. B.*—By the third section where two persons are jointly entitled, when upon the death of one the other takes the whole, he is liable to the duty although he may have had the legal right before the Act.] The construction put by the *Attorney General* on the 2nd section renders the 3rd section mere surplusage. The 14th section shews that the 2nd section refers to the acquisition of the title. The 4th section provides for “powers of appointment under any disposition taking effect upon the death of any person dying after the time appointed for the commencement of the Act.” It is clear that this must mean with reference to the case of a power of appointment by will—“of a person dying and leaving such will after the Act.” This section is meant to meet what must be a *casus omissus* under section 2. And the fact that it applies only to dispositions made after the Act throws light upon the true construction of the 2nd section. Section 8 expressly applies to dispositions which *shall be made* after the Act. [*Bramwell, B.*—A provision to obviate evasions of the Act would only apply to instruments made after the passing of it, because, until after the passing of the Act, no attempts would be made to evade it.] Then the 20th section provides that the duties shall be paid when the successor “becomes entitled in possession to his succession.” It is evident therefore that the word “entitled” in the 2nd section does not mean “entitled to the posses-

sion," but that the class of "successors" includes persons who are entitled in reversion. Section 14 confirms that view: it shews that there may be a "successor" who has an interest in personal property before he is "entitled in possession." [*Bramwell*, B.—*The Attorney General* would contend that we must read the 2nd section as if, after the words "income thereof," the words "of which he is to become possessed" were inserted.] In *Wilcox v. Smith* (a) Vice Chancellor *Kindersley* held that the words "past or future" in section 2, had reference to the time of the passing of the Act. But, in passing over that part of the section which relates to devolutions by law, he omitted to consider that which aids greatly the construction of the earlier part of the section.—They also referred at length to the judgment of Vice Chancellor *Kindersley* in *Wilcox v. Smith*.

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*The Attorney General* was not called on to argue.

POLLOCK, C. B.—We are all of opinion that the Crown is entitled to judgment. The judgment of Vice Chancellor *Kindersley*, in *Wilcox v. Smith*, is undoubtedly a masterly and elaborate investigation of the subject, containing a critical examination, with great acumen, of the whole Act. But I do not think it necessary so to deal with the subject, in order to attain a right conclusion. This is not the first time that our attention has been called to it. Very recently a question arose as to exemption from duty under this Act. I allude to the case of *The Attorney General v. Fitzjohn* (b). There it was never suggested that any doubt existed as to the construction of the Act on this point. It was conceded by the opposing counsel and assumed by the Court—I admit without argument, but certainly not without consideration; for time was taken to prepare the judgment, and

(a) 4 Drewry, 40.

(b) 2 H. & N. 465.



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amongst ourselves we considered what was the meaning of the Act. The question is whether any person, on or after the 19th May, 1853, succeeding to property by reason of the death of any person, be his right vested or contingent, is liable to succession duty. I am of opinion that he is. The words of the second section are "every past or future disposition of property." This language must be considered as uttered by the legislature on the last moment of the 18th May, 1853, so as to come into operation on the first moment of the 19th May, 1853, and then every past disposition of property means "every disposition of property anterior to the 19th May, 1853"—"by reason whereof any person has or shall become beneficially entitled to any property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act." Then if any estate be given to A. for life, remainder to B. in fee; if the testator made that disposition before the 19th May, 1853, and after that day A. died, B. who by reason of his death becomes entitled to the property or the income thereof, obtains a "succession," and is liable to pay the duty. That is the plain and natural meaning of the language used. If any commentary were wanted, the third section supplies it, even supposing that section to be surplusage, which I think it is not, because very subtle legal distinctions might have been taken with reference to the interest of joint tenants, and the result if one of them died. But by the third section it is plain, that though a person was absolutely entitled before the Act came into operation, so that in the natural order of events, if he lived long enough, he would be sure to get the whole property; yet if, by the death of his co-tenant, he gets a portion which he had not before, notwithstanding his interest was in one sense vested, he must pay duty upon the half, or whatever share he thus obtains. The conten-

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tion on behalf of the defendant is, that though it is expressly said that if a person in a particular case gets half the property he shall pay the duty upon that half; yet if he gets the whole he shall pay no duty at all. I cannot conceive so absurd a piece of legislation. Since the third section is so plain, it seems to me to require an argument that it is impossible that the construction put by the Attorney General on the second section can be correct. The utmost which the defendant's counsel have done has been to suggest a doubt, which I must say appears to me no doubt at all. The fifteenth section has been referred to—(His Lordship read the section.) But that is merely saying, that where a person would be liable to pay duty under the second section, if he has parted with his interest, the person to whom he has assigned it shall be liable to pay duty just as the original person would have been if he had retained his interest. I cannot see, as that refers expressly to the second section, how it furnishes any argument or carries the case further than that section. The word “past” in the second section, as I have already pointed out, must be read as if the Act passed on the last moment of the 18th May, 1853. The word “has” is to be taken as if uttered at that time; and I cannot accept the argument that the word “has” has crept in to supply the interval between May and August. It must be taken with the comment which arises out of the third section. I entertain no doubt that it was intended that whenever any person obtained, by the death of another, any benefit under an arrangement, though made before the Act, that benefit should be liable to duty. The seventh section may be adverted to as throwing some light on the subject.—(His Lordship read the section.) So that when an estate is left charged with an annuity, the person succeeding to it is to pay succession duty according

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to its then value; but when the annuitant dies, that is to be considered as so much more benefit, and duty is to be paid upon it. So also in every other case where an intermediate interest ceases; because the estate becomes of more value, by reason of some one dying after the Act came into operation, and therefore duty is payable on the increased value. Looking at these sections, although, like every other matter where language is used for the purpose of conveying ideas, it is open to criticism, I do not entertain the slightest doubt as to the construction of the Act.

BRAMWELL, B.—I am of the same opinion. We are asked to put an unnatural or forced meaning on certain words, because some particular clauses are supposed to be inconsistent with the general tenor of the Act, which I think is quite consistent with the second section. First, it is argued that Acts of this kind ought not to be construed, so as to impose a tax on the subject, unless their meaning is clear. For my part, whenever I can decide on no other ground, I will decide in favour of the subject, but so long as I can come to a conclusion without having recourse to a rule of that description, I will not resort to it. Then it is argued, that the Act ought not to be construed so as to give it a retrospective effect. I agree that is an excellent rule; but I doubt whether it ought to be applied to a Tax Act, since the tax is imposed because it is absolutely necessary. However, the answer to the argument is, that some of the clauses are clearly retrospective, and no reason can be suggested why they should not have a retrospective effect. The principal argument was, that there was some doubt about the second branch of the second section, and that if it had the meaning ascribed to it, it was repugnant to the interpretation put by the Crown on the

first branch. I express no opinion as to the second branch of that section; and without saying that I agree with the defendant's construction, we certainly ought not to misconstrue the plain words of the first branch because the second is not so comprehensive. The question is, what is the meaning of the first branch of that section? It is argued that it means, where the party has become entitled to property *after* the passing of the Act. That construction gives no meaning to the word "*has*." In the course of the argument I asked Mr. *Wilde* what meaning it had; he answered, there was difficulty in saying it had any meaning, and suggested that it might apply to the interval between May and August. The Lord Chief Baron has answered that; and I will merely add that, in my opinion, not only was it needless to make any provision for the time between May and August, but that if it was necessary to do so, it ought not to have been done by such comprehensive words as "*every* past disposition of property," but simply "such dispositions of property as have taken place between the 18th of May and 4th of August." Then it was said that the word "*has*" may mean where the becoming entitled, in one sense, is before the Act; but where the person who is to take the benefit is not known until after the Act; for instance, if the eldest living son of A. is to take at A.'s death, and that is certain before the Act, but A. does not die until after the Act, it could not be told who would be the eldest son of A. living at his death. That argument is in this dilemma; either the eldest son who is to take is not the person who has become entitled before the Act, and then the word "*has*" is not applicable to him; or he has become entitled before the Act, and then it is retrospective as to him. It would be strange if, where a sum of money was left equally between the children of A. and he died after the Act, the children would not pay in respect of

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their succession, but that if it were given to the eldest son of A., who should be living at his death, that eldest son would have to pay. Why is not the Act as retrospective in the one case as the other? Neither of these explanations has given any satisfactory solution to the presence of the word "has" in the second section; but in truth to my mind the section is singularly plain.—"Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property"—if it stopped there, there could be no doubt. But then it goes on—"upon the death of any person dying after the time appointed for the commencement of this Act," which it is argued points to the time when he becomes entitled. I feel satisfied that is not so. If the argument were well founded, this expression would be erroneous. If a person said, "I am entitled to an estate on the 1st of June next," according to the argument, that would be nonsense; he ought to say, "I shall be entitled to an estate on the 1st of June next." That is not so. If I say, "I am entitled now, but I am to have it on the 1st of June next,"—"I am entitled to an estate on the death of A. B." Both these expressions are perfectly intelligible. It may be that by exercising hypercriticism it might be shewn that they are elliptical (though I am not sure that they are even that), and that it ought to be said, "I am now entitled to an estate, the benefit of which I shall get on the 1st of June, or on the death of A. B." But the truth is, in common parlance (and this Act speaks in common parlance, and does not use terms of art), any one would say, "I am entitled on the 1st of June next,"—"I am entitled on a future day." Therefore it is not wrong to say that a person has become entitled to property on the death of a person who will die on a future day. The meaning of the second section is, "every past disposition of property, by reason

whereof any person has become beneficially entitled before the Act came into operation, to some property of which he will get the benefit upon the death of any person after the time appointed for the commencement of the Act." That does not introduce any new words; whereas the construction contended for puts in some new words, and leaves out others; and it is a construction not within purview of the Act, and repugnant to some of its clauses. I think that the case is plain, and that it is not necessary to hear any further argument upon a matter which has been already decided by Vice Chancellor *Kindersley*.

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WATSON, B.—I am of the same opinion. Looking at the object and purview of the Act, it is clear that the legislature intended that persons coming into possession of property on the death of any person alive when the Act came into operation, whether under a prior or subsequent disposition, should be liable to succession duty; and also in cases of devolution by law on the death of any person after the commencement of the Act. Therefore succession duty is not payable in respect of the vesting of an interest, but on its coming into possession, or (if I may so express it) when the fruit falls by reason of death after the commencement of the Act. Looking at the 3rd, 4th, 5th, 15th and 20th clauses of the Act, they all point to this—that succession duty is to be paid where property descends to another, either by disposition or devolution, on the death of any person after the commencement of the Act. Then, what words have been used for that purpose? The second section says "every past or future disposition of property," &c. The word "disposition" means either a disposition by will, or by deed or settlement. The section proceeds—"by reason whereof any person *has*"—that is, before the Act came into operation, for the word "past" applies to

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all prior periods and is not limited to the period between the 19th of May and 4th of August—"become beneficially entitled to any property or the income thereof," that shall be deemed a "succession" and he shall be called a "successor." I agree with Vice Chancellor *Kindersley* in the case of *Wilcox v. Smith* (a); and, after a careful examination of that case, I see no reason to doubt but that he arrived at a just conclusion. Here, there was a vested interest, which did not come into possession until after the Act passed—that is a past disposition. Then the defendant is a person who, by reason of that past disposition, has become beneficially entitled to property, or the income thereof, upon the death of a person dying after the time appointed for the commencement of the Act. Then, looking at the interpretation clause, we find that the term "succession" shall denote any property chargeable with duty under the Act. Therefore there is a succession by the death of a person after the Act, and it is property chargeable with duty under the Act, and, by the 20th section, that duty is payable when the successor becomes entitled in possession. I am of opinion that this is the true interpretation of the Act. Indeed, when the case of *The Attorney General v. Fitzjohn* (a) was before the Court, this point was never raised by the learned counsel for the defendant, but, on that occasion, the Lord Chief Baron, my brothers *Martin*, *Bramwell* and myself took considerable time in investigating the true meaning of the second section in conjunction with the other clauses, and we arrived at the conclusion which is expressed in the judgment, viz., that the interest of the testator's grandchildren in the property bequeathed to them was a "succession" within the meaning of the Act. Difficulties have been raised by the latter part of the second section, and no doubt many ingenious arguments may be

(a) 4 Drewry, 40.

(b) 2 H. &amp; N. 465.

suggested upon it, but I am inclined to think that, if that section be coupled with the 5th, all doubt will be removed. Whether that is so or not we need not decide, because this is not the case of a "devolution," but of a "disposition." In my opinion the construction which we put on the Act is in accordance with its general purview and principle, and to which we ought to give effect.

Judgment for the Crown.

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Feb. 12.

**T**HIS was a case stated for the opinion of this Court, on appeal from the decision of justices in petty sessions, under the 20 & 21 Vict. c. 43.

Thomas Whiteley, of Lindley, in the West Riding of the county of York, innkeeper, was summoned before three justices of the peace for the said Riding, on the 12th day of December instant, charged with having on the 6th day of December, being Sunday, wilfully kept open his house and premises, wherein he was licensed to sell beer and spirits by retail, for the reception of persons not being travellers, during the usual hours of the afternoon Divine service of the church there situate, to wit, between the hour of half past two and three o'clock in the afternoon of the same day, contrary to the tenor of his license and to the statute in that case made and provided.

The facts were admitted, viz., that the service at the Lindley Church commences at half past two o'clock, and that the defendant (now the appellant) had his house open and company therein, such company not being travellers, between half past two and three o'clock.

The information was laid under the statute 9 Geo. 4,

The provision in the licence to a victualler, granted under the 9 Geo. 4, c. 61, "that he shall not keep open his house, nor suffer any beer or other exciseable liquor to be conveyed from his premises during the usual hours of afternoon Divine service on Sundays," is impliedly repealed by subsequent statutes, and the law now in force is the 18 & 19 Vict. c. 118, which prohibits the sale of beer, wine, or spirits on Sundays, between the hours of three and five o'clock, and after eleven in the afternoon.



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c. 61, the 13th section of which gives the form of license to be granted under the authority of that Act. In the proviso to the licence are these words:—"And do not keep open his or her house except for the reception of travellers, nor permit or suffer any beer or other exciseable liquor to be consumed from or out of his (or her) premises during the usual hours of the morning and afternoon Divine service in the church or chapel of the parish or place in which his or her house is situated, on Sundays, Christmas Day or Good Fridays." The defendant's licence was according to the form given by the Act, and the information was laid as an offence against the tenor of this licence, pursuant to the 21st section of the same statute.

On the part of the defendant it was contended that the hours within which licensed houses are required to be closed have been altered and defined by subsequent statutes; that the statute 17 & 18 Vict. c. 79, had fixed the afternoon hours of closing as between half past two and six and from ten at night; and that the statute 18 & 19 Vict. c. 118, repealing the 17 & 18 Vict. c. 79, had fixed the hours as between three and five o'clock in the afternoon, and from eleven o'clock at night; that thus the hours of closing previously depending upon the varying times of service had been rendered uniform and certain, and that the defendant was entitled to keep open his house until three o'clock in the day named. It was argued that an opposite construction would operate unfairly in those places where service commences earlier than three o'clock; inasmuch as notwithstanding the earlier hour of closing, the innkeeper could not reopen his house until five o'clock, and that he would thus be subjected to the restrictions of the last Act without being entitled to the privileges which (according to the defendant's contention) it was designed to give him. On the back of the licence the 2nd section of the 18 & 19 Vict.

c. 118, had been set out, the words "from *three to five*" being printed in large characters for the innkeeper's directions. On behalf of the informant it was argued that the Act, 9 Geo. 4, c. 61, had not been repealed, and that the form of licence given by that Act is still binding in all its terms and conditions upon the innkeeper. A majority of the justices having concurred in this view, the defendant was convicted in a small penalty and expenses. The defendant being dissatisfied with the said conviction, as being erroneous in point of law, appealed against the same, whereupon the present case was stated for the opinion of this Court.

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*Pickering*, for the appellant.—The licence was granted, and the conviction took place under the 9 Geo. 4, c. 61. Section 13 requires the licence to be according to the form in schedule (C). That provides that the victualler shall "not keep open his house, except for the reception of travellers, nor permit or suffer any beer or other exciseable liquor to be conveyed from or out of his premises, during the usual hours of the morning and afternoon Divine service in the church or chapel of the parish or place in which his house is situated, on Sundays, Christmas Day or Good Friday." That provision however has been repealed by subsequent statutes. The 11 Geo. 4 & 1 Wm. 4, c. 64, which permitted the general sale of beer, prohibits the sale of it "between the hours of ten o'clock in the forenoon and one o'clock in the afternoon," &c., and "between the hours of three and five o'clock in the afternoon on any Sunday," &c.: sect. 14. The schedule of that Act contains a new form of licence, corresponding with the alteration of hours, and the 13th section imposes penalties for offences against the provisions of the licence. That Act was amended by

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the 4 & 5 Wm. 4, c. 85, which required the justices in petty sessions to fix, once a year, the hours at which houses licenced to sell beer under that Act should be opened and closed: "Provided that the hour so to be fixed for opening any such house shall not, in any case, be earlier than five o'clock in the morning, nor for closing the same later than eleven o'clock at night, or before one o'clock in the afternoon on Sunday," &c.: sect. 6. The 3 & 4 Vict. c. 61, s. 14, repealed the enactments of the 11 Geo. 4 & 1 Wm. 4, c. 64, and 4 & 5 Wm. 4, c. 85, with respect to the hours of selling beer, and, by section 15, provided that no person should sell beer "before one o'clock in the afternoon, nor at any time during which the houses of licensed victuallers then were or thereafter should be closed on any Sunday," &c. The 11 & 12 Vict. c. 49, "for regulating the sale of beer and other liquors on the Lord's Day," by section 2, repealed the 3 & 4 Vict. c. 61, s. 15. By section 4, "no person shall open any house or place of public resort for the sale of fermented or distilled liquors, or sell therein such liquors, in England or Scotland, before the hour of half past twelve o'clock in the afternoon, or where the morning Divine service in the church, chapel, kirk, or principal place of worship, shall not usually terminate by that time, before the time of the termination of such service on Sunday," &c. The 17 & 18 Vict. c. 79, prohibited the sale of beer, wine or spirits "between half past two o'clock and six o'clock, or after ten o'clock in the afternoon on Sunday," &c. (sect. 1.) That Act was repealed by the 18 & 19 Vict. c. 118, which prohibits the sale of beer, wine or spirits, "between the hours of three and five o'clock in the afternoon, nor after eleven o'clock in the afternoon, on Sunday," &c.: (sects. 2, 3). Section 6 imposes a penalty of 5*l.* for every offence against that Act, and declares that every separate sale shall be deemed a separate offence. This Act has, in effect, repealed the

9 Geo. 4, c. 61, s. 13, and substituted certain fixed hours for the hours of Divine service. The penalties imposed by the 9 Geo. 4, c. 61, s. 21, are different from those under the 18 & 19 Vict. c. 118; so that if the construction of the other side is correct, and Divine service did not commence until half past three o'clock, and a victualler sold beer or spirits between three and five, he would, for the first half hour, be liable to the penalty under the latter Act, and when Divine service commenced, and whilst it continued, under the former Act. *Rex v. Cator* (a) shews that the penalty cannot be imposed under both Acts.—The Court then called on

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*A. J. Johnston*, for the respondent.—The legislature had two objects in view, first, to prohibit drinking during the hours of Divine service; secondly, to restrain Sunday trading. The 9 Geo. 4, c. 61, is not repealed by the 11 Geo. 4 & 1 Wm. 4, c. 64. The provisions, in the form of licence, prescribed by schedule (C.) of the 9 Geo. 4, c. 61, are incorporated with and part of that Act, because, by section 21, any offence against the tenor of the licence, subjects the party to certain penalties. Since there is no express repeal, the question is, whether there is any implied repeal of that part of the licence which prohibits the sale of beer or liquor during the hours of Divine service. The intention of the legislature, by the 18 & 19 Vict. c. 118, was to superadd a penalty, and further to restrain Sunday trading, while, at the same time, they protected Divine service. They restrict the trading apart from the consideration of Divine service. As the hours of Divine service may be fluctuating, it might be supposed that a fixed period was introduced in order to render the time certain; but that supposition is inconsistent with other provisions. By the 1 Wm. 4, c. 64, s. 14, cer-

(a) 4 Burr. 2026.

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tain hours were fixed during which the sale of beer was prohibited, while, under the 9 Geo. 4, c. 61, the time was the period of Divine service. Those two enactments being in force at the same time, there is no reason to conclude that the legislature intended to substitute the fixed time mentioned in the 18 & 19 Vict. c. 118, for the time of Divine service mentioned in the 9 Geo. 4, c. 61. The 11 & 12 Vict. c. 49 shews that the legislature intended to protect the period of Divine service, for although a certain hour is fixed, the termination of Divine service is also mentioned. That view is confirmed by the 17 & 18 Vict. c. 79, for its preamble recites that "the provisions in force against the sale of fermented and distilled liquors on the morning of the Lord's Day, have been found to be attended with great benefit;" and although a fixed time is named, that does not interfere with the time of Divine service. The preamble of the 18 & 19 Vict. c. 118 shews that its object was to restrict Sunday trading in beer and liquors; and it prohibits their sale between three and five o'clock in the afternoon, leaving untouched the prohibition under the 9 Geo. 4, c. 61, during the hours of Divine service.

MARTIN, B.—I am of opinion that there is nothing in the acts of parliament, which have been mentioned in the argument, to prevent the appellant from selling spirits and beer between the hours of half past two and three o'clock in the afternoon of Sunday. The first statute on this subject is the 9 Geo. 4, c. 61, which prescribes the form of licence; which I understand is still used. It prohibits the publican from selling beer or other exciseable liquor "during the usual hours of the morning and afternoon Divine service in the church or chapel of the parish or place in which his house is situated." That remained the law until the 11 & 12 Vict. c. 49, as regards public houses, properly so called in contra-distinction to beer

shops. The 11 Geo. 4 & 1 Wm. 4, c. 64, allowed any person, being a householder, to obtain a licence for selling by retail beer alone, which licence was to be granted independently of any justice of the peace; and thus put the sale of beer on a new footing. The tenor of the licence defines the hours during which the beer-shop keeper is prohibited from selling beer on Sunday, and those hours are fixed without any reference to Divine service. Then comes the 11 & 12 Vict. c. 49: that is directed to the morning service alone, and leaves the afternoon service as it stood under the 9 Geo. 4, c. 61. The 4th section provides that no person shall sell beer or spirits on Sunday "before the hour of half past twelve of the clock in the afternoon, or where the morning Divine service in the church, chapel, kirk, or principal place of worship shall not usually terminate by that time, before the time of the termination of such service." That Act therefore fixes a certain time, viz., half past twelve absolutely, besides any further time which may intervene between that hour and the termination of Divine service, but leaving the afternoon as before. Then came the 17 & 18 Vict. c. 79, which dealt with the afternoon service only. The first section enacted that "between half past two o'clock and six o'clock or after ten o'clock in the afternoon, on Sunday," "no beer, wine, spirits or any fermented or distilled liquor should be sold. It is to be observed, that the period of afternoon service is not introduced, but a certain fixed time during which there is an absolute prohibition of the sale. The 18 & 19 Vict. c. 118 only altered the hours from half past two to six, to "between the hours of three and five o'clock in the afternoon, and after eleven at night." The circumstance of these statutes leaving the morning service as it was, and making no mention of the afternoon service, satisfies me that the real intention of the legislature

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was to fix certain hours in the afternoon during which the publican was to be prohibited from carrying on his trade ; but to leave it free at all other times. It is evident that such was the object, because, in providing for the morning, the legislature makes the termination of the morning service the limit, but in dealing with the afternoon it only names certain fixed hours. Such is the true construction of these Acts ; but it is impossible to dismiss from our minds what we know, viz., that these Acts were passed for the express purpose of fixing the hours and preventing all question, so that people might know with certainty when these houses were to be closed, instead of having the periods regulated by the hours of Divine service. For these reasons I think that the justice at petty sessions who held that this charge ought to have been dismissed was right, and that the two justices who held otherwise were wrong.

BRAMWELL, B.—I am of the same opinion. The fault I find with Mr. *Johnston's* argument is, that instead of saying that which he contends for is the result of a slip or blunder, he argues that it was the intention of the legislature. Now, that seems to me impossible. It would be such a mistake to leave this question one to be argued instead of making it clear by a few words, that it would be an imputation on the legislature to suppose it. It may be that inadvertently the law has been left as Mr. *Johnston* contends. However, intentionally or not, whether the law is so I now proceed to consider. I am of opinion that the 9 Geo. 4, c. 61, is repealed, and on two grounds.—First, that Act prohibited the sale of beer and spirits during the usual hours of morning and afternoon service. Then came the 11 Geo. 4 & 1 Wm. 4, c. 64, authorizing the sale of beer alone, and which prohibits the beer-shop keeper from selling beer on Sunday between the hours of ten o'clock

in the forenoon and one in the afternoon, or between the hours of three and five o'clock in the afternoon. So that the licensed victualler was in this predicament—he could not sell beer or spirits during Divine service, although he might before or after, and consequently, if the service was over at four o'clock, he might sell between four and five. On the other hand, the beer-shop keeper was not prohibited from selling beer during church hours, but he was absolutely prohibited between ten o'clock and one, and three and five. The two persons were in different positions, but several Acts passed which assumed that they were in the same situation. The last is the 18 & 19 Vict. c. 118, s. 2, which says “It shall not be lawful for any licensed victualler or person licensed to sell beer by retail, &c., or any person licensed or authorized to sell any fermented or distilled liquors &c. to open or keep open his house for the sale of or to sell beer, wine, spirits or any other fermented or distilled liquor between the hours of three and five o'clock in the afternoon, nor after eleven o'clock in the afternoon, on Sunday,” &c. It seems to me therefore that the legislature contemplated these two persons as being in the same category; and that, as the beer-shop keeper was not prohibited from selling beer between the hours of three and five o'clock in the afternoon, the legislature shew that they intended to put the licensed victualler in the same situation.—Secondly: the publican, up to the 11 & 12 Vict. c. 49, was prohibited by his licence from opening his house for the sale of beer or liquor during the hours of Divine service; but by that Act a change was made as to the *morning service*, which, in my opinion, clearly repeals the 9 Geo. 4, c. 61. The first section of the 11 & 12 Vict. c. 49, says “No licensed victualler, or person licensed to sell beer by retail, &c., shall open his house for the sale of wine, spirits, beer &c.,

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or sell the same on Sunday before half past twelve o'clock in the afternoon, or where the morning Divine service in the church, chapel, kirk or principal place of worship of the parish or place shall not usually terminate by that time, before the time of the termination of such service." It is clear that this provision was not cumulative. The 9 Geo. 4, c. 61, could not co-exist with it; for that Act, merged in it, since the 9 Geo. 4, c. 61, comprehended only the time of church service; as the 11 & 12 Vict. c. 49 added up to half past twelve and later, if necessary. That indeed is true of morning service only; but to my mind the latter Act repeals the former, because it renders it a matter of supererogation. Then come the two Acts, 17 & 18 Vict. c. 79 and 18 & 19 Vict. c. 118. The former repealed the provisions of the 11 & 12 Vict. c. 49, quoad the morning service, and substituted a more comprehensive time in respect of the afternoon service. It is true that the afternoon service may in some places commence as early as half past one, but legislation is directed to that which ordinarily happens. I think therefore that the 17 & 18 Vict. c. 79, when read in conjunction with the 11 & 12 Vict. c. 49, renders unnecessary or repeals the 9 Geo. 4, c. 61, and consequently the only prohibition is that contained in the 18 & 19 Vict. c. 118. I am of opinion that in this case the opening the house between half past two and three o'clock was no offence. Nothing can be more inconvenient than that, instead of the hours being fixed, they should be uncertain. If Mr. Johnston's argument is right, any clergyman might shut up the public houses in his parish earlier or later, just as he thought it desirable. Did the legislature intend to give the clergyman of the parish such a power? They did not do it by the 9 Geo. 4, c. 61, because, under that Act, public houses were only required to be closed during the usual time of Divine service. Whether we look at the

matter with reference to convenience, or with reference to the statutes on the subject, there is no doubt that the original enactment is gone.

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WATSON, B.—I am of the same opinion. The legislation with respect to public houses and beer houses was amalgamated under the 17 & 18 Vict. c. 79 and the 18 & 19 Vict. c. 118. The first statute on the subject is the 9 Geo. 4, c. 61, which, Mr. *Johnston* contends, remains entirely unrepealed; we must therefore look to the subsequent statutes to see whether that is so. There are, indeed, no express words of repeal in any of these Acts; but when we look at their provisions, it is clear that such is their effect. Mr. *Johnston* says that these statutes have two objects, the one to prevent tippling during the hours of Divine service, the other to place a restriction on Sunday trading. That is not so. They all have one object, viz., to prevent public houses and beer shops from being open at times when it would be a desecration of the Sabbath; and for that purpose it became necessary to define the hours. Morning church service begins, in some places, as early as eight o'clock; sometimes at ten, half past ten, eleven, and even as late as twelve. The first enactment was, that public houses should be closed during the time of Divine service in the principal church or chapel of the parish or place in which the house is situated, whether the mother church, or a district church, or a chapel of ease. The 11 & 12 Vict. c. 49, which prohibited any person from selling beer, wine or spirits on Sunday, before half past twelve o'clock, or until the termination of Divine service, had for its object the prevention of tippling during that time. But when we look at the subsequent legislation, which included beer shops, we find that, instead of defining the hours of closing by the time of Divine service, they are defined by the hours of from

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three to five o'clock. The 17 & 18 Vict. c. 79, which applied both to public houses and beer shops, enacted that "no person shall open any house or place of public resort for the sale of fermented or distilled liquors, or sell therein such liquors, &c., between half-past two and six o'clock, or after ten o'clock in the afternoon on Sunday." There the hours are defined. Why are they defined? Because the time of afternoon service varies in different places: it may be two, half-past two, three, or four. Again, the 18 & 19 Vict. c. 118, which also applies both to public houses and beer shops, defines certain hours in the afternoon, viz. from three to five, which were meant to designate the hours during which Divine service is probably being performed,—at all events the hours mentioned would cover that period of time. The legislature may have been influenced by this consideration: in some places Divine service commences sometimes at three, sometimes at half-past two, according as it is summer or winter, and as a publican might be misled by a change in the hour, in order to prevent that, the legislature has defined the time just as they have defined the hours of burglary from a certain time in the evening to a certain time in the morning. Look at the inconsistency which would arise from a different construction of these statutes. Beer shops require as much watching as public houses; but according to Mr. *Johnston's* argument, if in a street in York there was a beer shop and also a public house, and Divine service began at half-past two, the beer shop keeper might sell beer from half-past two till three, while the publican, a person with greater capital and probably a better regulated house, would be subject to a penalty for so doing. There is another view of the subject, for we must import into Courts of justice what we know of the world. The afternoon service at York Minster ends at half-past five, in other churches in York it begins at two,

so that if Mr. *Johnston's* argument is well founded, all the publicans in York would be liable to penalties for keeping their houses open when any part of the service was going on in any part of the city, and would therefore be required, under a penalty, to know the hours of Divine service at every church in it. Then again, when I find that the 9 Geo. 4, c. 61, imposes a penalty of 5*l*. for the first offence, 10*l*. for the second, and 50*l*. for the third; whereas the 18 & 19 Vict. c. 118, which comprises beer shops, inflicts one penalty only of 5*l*., it is clear to me that the latter Act intended to repeal the penalty imposed by the former. Suppose a publican kept his house open between three and five in the afternoon, if the 9 Geo. 4, c. 61, remains entire, he would be liable to a penalty for keeping his house open *during Divine service*, and also to another penalty for keeping it open *between three and five*. For these reasons I think it manifest that the object of all these Acts is the same, and looking at their several provisions I cannot doubt that the only Act now in force is the 18 & 19 Vict. c. 118, and that therefore this conviction is wrong.

Conviction quashed.

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EX PARTE COBBETT.

Feb. 1.

**T**HIS was an application on behalf of one Cobbett, a prisoner and the plaintiff in a suit in this Court, for a writ of habeas corpus to bring him up for the purpose of conducting his cause in person at *Nisi prius*.

*Cur. adv. vult.*

A plaintiff in lawful custody for debt is not entitled *as of right* to a writ of habeas corpus to bring him up to conduct his cause in person at the trial.

POLLOCK, C. B., now said.—We have considered this matter and think that the application ought not to be

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granted. We are all of opinion that a plaintiff, who is in lawful custody as a prisoner for debt is not entitled *as of right* to a writ of habeas corpus to bring him up to conduct his own cause at the trial. If his evidence is necessary in an action brought by him, he has as much right to a writ of habeas corpus ad testificandum to procure his attendance as a witness in his own suit as if he were applying for it to bring up any other witness. But, as I have before said, a suitor is not entitled *as of right* to a writ of habeas corpus for the purpose of conducting his own cause. Without saying that there can exist no case in which the Court would permit that to be done, it is sufficient to say that in this case the Court in its discretion does not think that the writ ought to be granted.

Rule refused.



Feb. 10.

CUMMINS v. BIRKETT.

An action having been brought by a succeeding rector against his predecessor, to recover damages for dilapidations

**T**HIS was an action by the rector of the parish of Saint James, Colchester, against the late rector, to recover damages for dilapidations of the rectory house and chancel of the church of that parish. The defendant paid 400*l.* into Court

to the rectory house, at Colchester in Essex, and money having been paid into Court, a Judge made an order under the 3rd section of the Common Law Procedure Act, 1854, that the "cause be referred to the County Court judge of Essex." The order was delivered to G., the judge of the County Court of Essex, held, amongst other places, at Colchester, who refused to take the reference, on the ground that he was fully occupied with the business of the County Court. It appeared that there were other judges of County Courts in Essex. A rule having been obtained calling on G. to shew cause why he should not proceed with the reference pursuant to the Judge's order.—*Held*: First, that G. was the person intended and was sufficiently designated in the order; and that, even if he were not, it was no objection to his proceeding with the reference under that rule.

Secondly, that the matter in dispute was a matter of mere account within the meaning of the 3rd section of the Common Law Procedure Act, 1854; and that, even if it were not, the County Court judge could not on that ground refuse to proceed with the reference, since the statute only requires that it should appear "to the satisfaction of the Judge," that the matter is of such a nature, and if his decision is erroneous the proper course is to appeal to the Court.

Thirdly, that the County Court judge had no option, but was bound to obey the order and proceed with the reference.

and pleaded that the said sum was sufficient to satisfy the plaintiff's claim. The plaintiff then took out a summons to refer the cause to an arbitrator under the 3rd section of "The Common Law Procedure Act, 1854," and *Watson, B.*, before whom the summons was heard, made an order that the "cause be referred to the County Court judge of Essex." A copy of the order was thereupon sent to the clerk of the County Court of Essex, at Colchester, with a request that an early day might be appointed for the reference. The clerk in answer sent a copy of a letter to him from Mr. Gurdon, the judge of the County Court, which was in the following terms:—

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"Brantham,

"Dear Sir,

18th Dec. 1857.

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"Supposing it was intended to refer this case to me, which I have no means of knowing, I could only reply as I did once before, that my time is already fully occupied with the business of the several courts over which I preside, and the duties of which I am paid for discharging. If the parties are not willing to get this order revoked and another arbitrator appointed, they must take such course as they shall be advised.

"Yours faithfully,

"WM. GURDON."

The plaintiff then took out a summons to rescind the order of reference and refer the cause to an officer of the Court or some other arbitrator. The defendant refused to consent to the order, and it was in consequence dismissed. Application was again made to Mr. Gurdon to take the reference, but he stated that he "adhered to his former determination and declined to accept it, as his time was fully occupied in County Court business." It appeared that there were other judges of County Courts in Essex.

*Mihoard*, in last Term (Jan. 15), moved for a rule to shew

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cause why the order of reference should not be rescinded, on the ground that the plaintiff did not wish to proceed before an unwilling arbitrator. The Court intimated an opinion that this was not a proper application, inasmuch as the County Court judge was bound to obey the order of the Court; and they granted a rule calling on him to shew cause why he should not proceed with the reference pursuant to the order, against which

*Bovill* and *Mellish* shewed cause (Feb. 1).—First, the Judge's order was improperly directed. It did not refer the matter in dispute to the "County Court of Essex," but to the "County Court judge of Essex." Mr. Gurdon is judge of the County Court held at several places in Essex and amongst others at Colchester; and there are other judges of County Courts held at other places in Essex.—Secondly, an action for dilapidations is not a matter of mere account within the meaning of the 3rd section of the Common Law Procedure Act, 1854. The claim is not for work or labour, but in the nature of waste. [*Martin*, B., referred to *Chapman v. Van Toll* (a).]—Thirdly, it is optional with the County Court judge whether he will proceed with the reference or not. The matter is referred to him as an arbitrator, not as judge of the County Court. The 3rd section of the Common Law Procedure Act, 1854, empowers the Court or a Judge to decide mere matter of account in a summary manner, "or to order that such matter be referred to an arbitrator appointed by the parties, or to any officer of the Court, or, in county causes, to the judge of any County Court." This reference would not be a proceeding in the County Court. Certain modes of procedure must be adopted in County Courts, viz., the plaint, the answer, the trial, and the entry of judgment. The

(a) Q. B., M. T. 1857, Nov. 9.

judge has no power to make rules for himself, and there are certain officers, such as the clerk, bailiff, &c., who have certain specified duties to perform, and who are not the officers of the judge but of the Court. By the 19 & 20 Vict. c. 108, s. 26, causes may be referred to a County Court where the claim does not exceed 50*l*, or has been reduced to that amount by payment or set-off; but in such case it is provided by the 65th Rule of the County Courts, that the cause shall be heard as if a plaint had been originally entered in that Court. Under the 3rd section of the Common Law Procedure Act, 1854, there is no limit as to the amount of the claim. Besides, where is the judge to hold his sittings? Could he do so in the Court-house, or in any one of his districts, or in an adjoining county? Again, a County Court judge may appoint a deputy: could he under an order of reference? These considerations shew that a reference to a County Court judge under this Act is not to him in his judicial capacity, but as an ordinary arbitrator; and, consequently, he is at liberty to refuse it if he thinks fit. A committee of County Court judges have expressed an opinion that it is optional. Besides a fee of 2*l*. 2*s*. only is allowed to a County Court judge for each meeting; and he must necessarily incur some expense, as for instance in stamping the award, &c. [*Pollock*, C. B.—No doubt those expenses would be allowed as incurred by him in the discharge of his duty as a Judge.] The 19 & 20 Vict. c. 108, s. 79, enables the Treasury, with the consent of the Lord Chancellor, to alter the fees allowed to County Court judges; but if this is not a proceeding in the County Court they would have no jurisdiction under that Act. When the County Court judges were prevented from practising at the bar, it was doubted whether the prohibition applied to arbitrators, and the object of the 3rd section of the Common

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Law Procedure Act, 1854, was to remove all doubt on the subject.

*Milward*, in support of the rule.—First, Mr. Gurdon comes within the definition in the order of reference, and it is brought to his knowledge that he is the person intended. The description is immaterial; and an award made by him would be perfectly good.—Secondly, the matter in dispute consists of matter of mere account. The sole question is as to the value of the work and materials; and the form of action in which it arises makes no difference. Besides the plaintiff is only bound to make out, “to the satisfaction of the Judge,” that his claim is a mere matter of account, and he has done so: the affirmative is on the defendant to shew that it is not.—Thirdly, Mr. Gurdon was bound to proceed with the reference. Such an order is equally compulsory on a judge of the County Court as on an officer of the superior Courts: the statute makes no distinction between them. The expenses incurred in the reference would be allowed.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

MARTIN, B.—This was a rule calling upon Mr. Gurdon, a judge of a County Court in Essex, to shew cause why he should not proceed with a reference.

The facts were these.—An action had been brought by a succeeding rector against his predecessor, to recover damages for dilapidations of a rectory house and premises in Colchester in Essex, and a sum of 400*l.* had been paid into Court by the defendant. The plaintiff claimed damages ultra. A summons was taken out, which was heard before

my brother *Watson*, who, upon hearing the parties, thought that the amount of the dilapidations was a matter of account within the meaning of the 3rd section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), and he made an order that it should be "referred to the County Court judge of Essex." The order was delivered to Mr. Gurdon, who declined to take the reference, and in consequence a rule was moved for, which was drawn up in a form suggested by the Court. Cause has been shewn against it, and three grounds urged. First, that the order was not properly directed. It appeared that Mr. Gurdon's appointment is to be a judge of the County Court of Essex, and amongst others at Colchester; and that there are other judges of County Courts in Essex to be held at other places. We think that this objection is not tenable. Mr. Gurdon was a judge of a County Court in Essex: one of the places in which he was to act is Colchester, and we feel no doubt that he was the person intended by Baron *Watson's* order, and was sufficiently designated. But, were there any doubt upon this point (and we think there is none), it would be no objection to Mr. Gurdon now acting upon this rule and proceeding with the reference.

The second objection was, that the matter in dispute was not a matter of mere account within the meaning of the 3rd section. In our opinion it was so; but, whether it was so or not, we are clearly of opinion that it affords no answer to this rule. The jurisdiction is given to the judge upon its being made appear to *his satisfaction that the matter in dispute consists of matter of mere account which cannot conveniently be tried in the ordinary way*. It is the judge who is to be satisfied, and if he be in error there is an appeal to the Court and his order may be rescinded; but we are most clearly of opinion that neither the officer of the Court itself nor the judge of the County Court can

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lawfully refuse to obey the order, upon the ground that the judge was wrong in making it.

If the judge of the County Court be desirous to have this matter questioned, his proper course is to apply to the judge or to the Court to have the order set aside: but it would be contrary to the uniform practice in similar cases when the judge has jurisdiction to allow his order to be disobeyed upon the ground that his jurisdiction has not been properly exercised.

The third and more important ground was that it was optional with the County Court judge whether he would obey the order or not. It was stated that different views were entertained by a committee of the County Court judges, who were of opinion that it was optional, and the Treasury, who had made an order with the concurrence of the Lord Chancellor, directing a fee of 2*l.* to be paid for each meeting.

It seems to us that the enactment is very clear, and that there can exist no doubt but that it is obligatory upon the County Court judge to obey the order and undertake the reference. The authority given to the Court or judge is, first to themselves—if they or he think fit to decide the matter in a summary manner. Secondly, *to order* that such matter be referred to an arbitrator appointed by the parties, or to an officer of the Court, *or in country cases to a judge of any County Court.* It seems to us that nothing can be more clear than the words of the enactment, and that the judge may lawfully order the matter to be referred in country cases to the judge of the County Court; and that consequently it is his duty to give obedience to the order.

It was urged that the officers of the County Court, such as the registrar, &c., were not bound to give any attendance upon the reference: that the arbitration could not be held in the Court-house: that upon the words of the Act the

Judge might order a County Court judge of Cornwall to take a reference upon a matter of dispute arising in Northumberland; and there were several other objections of this character, viz., as to the expense of the stamp on the award, which it is quite clear the County Court judge is not called upon to incur. But, even if these objections were of more importance than we consider them to be, we think they would afford no answer to the plain and direct words and provision of the act of parliament. The concluding sentence of the section shews that the judge is to act as an arbitrator, and is to make an award or certificate which is to be enforceable as the verdict of a jury.

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If it be the case, as was suggested, that the exercise of this power to refer imposes upon County Court judges an undue and excessive amount of labour, it will be for the legislature to relieve them from it; but, so long as the law remains unaltered, we entertain no doubt that it casts upon them the duty of taking references, when directed to do so by a rule of the Superior Courts or the order of a Judge.

We think it right to observe, that the course of modern legislation has been to cast upon the judges of the Superior Courts new duties, such as the duty of deciding upon appeals from County Courts; the duties imposed by an Act of the last Session (a), of deciding upon cases stated by justices upon matters coming before them in a summary way; upon the Court of Common Pleas in deciding appeals from revising barristers, and upon matters connected with all the railways in the Kingdom. All these duties, and some of them are onerous, have been readily and cheerfully undertaken; and we allude to this subject for the satisfaction of the County Court judges themselves, whom we are most desirous to treat with the

(a) 20 & 21 Vict. c. 43.

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utmost respect and consideration, and to support and uphold in the discharge of their functions and duties. The rule must therefore be made absolute.

Rule absolute.

## IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

Feb. 23.

### GIBBS and Others v. THE TRUSTEES OF THE LIVERPOOL DOCKS.

The Trustees of the Liverpool Docks are a corporation receiving tolls and port duties for the purpose

THIS was a proceeding in error upon the judgment of the Court of Exchequer. The pleadings and judgment in the Court below will be found 1 H. & N. p. 439.

of discharging a public duty, from which members derive no emolument; and they have a discretion as to the application of the funds and as to the time and manner in which they will repair the docks. A declaration against the trustees alleged, first, that they were the proprietors of a certain dock, which was made by them under the powers of the 7 & 8 Vict. c. lxxx., and that under that Act and other Acts they received from vessels certain tolls, which under the said Acts they were bound, and it was their duty to apply in and about (amongst other things) the maintaining, cleansing, and supporting the dock so as to be in a fit state for vessels entering and navigating the same.—Averment: that the funds in the hands of the defendants arising from the said tolls were fully sufficient for maintaining, cleansing, and supporting the dock, in addition to the satisfaction and discharge of all other liabilities and incumbrances in and about the same.—Breach: that the defendants did not take reasonable or any care in or about maintaining, &c., the dock, inasmuch that the plaintiff's vessel in endeavouring to enter, struck on the mud, which, by the negligence of the defendants, lay at the entrance of the dock, and in consequence thereof the cargo was damaged.—The second count alleged that the defendants well knowing that the dock and the entrance thereto were, by reason of accumulated mud, in an unfit state to be navigated and used by vessels then accustomed to navigate and use the same, did not take reasonable or any care to put the same into a fit state for that purpose; but negligently permitted the dock and the entrance thereof to continue, while the same was by their permission navigated and used by such vessels, in an unfit state for want of reasonable cleansing, inasmuch that the vessel in question, being such vessel as was used and accustomed to navigate the dock, in endeavouring to enter struck against the bed of mud and was damaged together with the cargo. On demurrer to the declaration—*Held*, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the defendants were liable, since though it might be doubted whether the declaration did not disclose a state of facts under which they had a positive duty to perform, and not merely a discretion to exercise, as to removing the danger; at all events if they had a discretion, under the circumstances, to let the danger continue, they ought as soon as they knew of it to have closed the dock to the public; and they had no right with a knowledge of its dangerous condition to keep it open and invite the vessel in question into the peril which they knew it must encounter, by continuing to hold out to the public that any ship, on payment of the tolls, might enter and navigate the dock.

Also that under such circumstances, the duty is equally cast on those who have the receipt of the tolls and management of the dock, whether the tolls are received for a beneficial or a fiduciary purpose.

*Cleasby* (with whom was *Wilde*), for the plaintiffs (a).—The defendants were bound to take due care that the docks were in a proper state for navigation. They are empowered to levy tolls for the purpose of keeping the docks in repair. That appears from the 8 Anne, c. 12, s. 3; 2 Geo. 3, c. 86, s. 5; 25 Geo. 3, c. 15, s. 5, which Acts are recited in and incorporated by 51 Geo. 3, c. cxliii., and from sections 27 and 28 of the latter statute. A duty to cleanse the docks is therefore cast upon them. They are in the position of parties who are bound to repair *ratione tenuræ*. It is not necessary to contend that they are bound at all events to keep the docks in repair; it is sufficient for the purpose of the present action to shew that they are bound to use due and proper care to keep them in a state fit for navigation. They are liable to an action if damage results to an individual from any neglect of the duty cast upon them, because they receive a reward for the doing of such duty: *Henley v. The Mayor and Burgesses of Lyme* (b). [*Williams, J.*—Do you contend that an action would lie against the trustees of a turnpike road for an accident arising from the non-repair of the road? *Cockburn, C. J.*, referred to *Harris v. Baker* (c). *Coleridge, J.*—If turnpike trustees were liable they would be liable personally.] It may be conceded that no action lies against a parish or a county for the nonrepair of a road or bridge, as was held in *Russell v. The Men of Devon* (d). There are technical reasons why in such case no action can be maintained; but it is otherwise where damage results from the neglect of duty by an individual or a corporation. In

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(a) The case was argued in Hilary Vacation, Feb. 7, and in Trinity Vacation, June 19, 1857, before *Cockburn, C. J.*, *Coleridge, J.*, *Wightman, J.*, *Cresswell, J.*, *Williams, J.*, *Crowder, J.*, and

*Crompton, J.*

(b) 5 Bing. 91; S. P. in error, 3 B. & Ad. 77.

(c) 4 M. & Sel. 27.

(d) 2 T. R. 667.

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*The Lancaster Canal Company v. Parnaby (a)*, it was held that as the facts shewed that the Company made the canal for their profit, and opened it to the public on payment of tolls to the Company, the common law imposed a duty on the proprietors to take reasonable care so long as they left it open for the public use of all who chose to navigate it, that they might navigate it without danger. It is objected that the defendants are trustees for public purposes: but that is a fallacy. They receive tolls for their own purposes as a corporation, though the individuals composing the corporation receive no benefit. No indictment would lie against the defendants for the neglect of duty charged in this declaration. It does not charge them as persons compellable at all events to keep the docks in repair: it is merely that, having sufficient funds, they neglected to do so. [*Crompton J.*—There may be a case where there has been negligence, and yet the trustees acting bonâ fide in the exercise of their discretion may have omitted to repair.] There is no authority that trustees for public purposes, whether incorporated or not, are not liable for negligence. In *Boulton v. Crouther (b)*, which was an action against the trustees of a Turnpike Act, *Abbott, C. J.*, said, "The Act authorized the trustees to do what they had done. If in doing the act they acted arbitrarily, carelessly, or oppressively, the law, in my opinion, has provided a remedy." [*Crompton, J.*, referred to *Scott v. The Mayor of Manchester (c)*.] *Jones v. Bird (d)* is an authority that such an action is maintainable. *Sutton v. Clarke (e)* is relied upon as an authority to the contrary, but it only shews that an action is not maintainable if trustees act to the best of their ability and without malice. In *Harris v. Baker (f)* the

(a) 11 A. & E. 228.

(b) 2 B. & C. 703; see p. 707.

(c) 1 H. & N. 59. In error,

2 H. & N. 204.

(d) 5 B. & Ald. 887.

(e) 6 Taunt. 29.

(f) 4 M. & Sel. 27.

damage did not arise from any breach of duty on the part of the commissioners. They were not bound to light heaps of rubbish, but merely to set up such lamps to light the road as in their discretion they thought proper. It is objected that the defendants have a discretion as to cleansing the docks, under 6 Geo. 4, c. clxxxvii. s. 130(a); and 4 Vict. c. xxx. s. 124(b). It is not disputed that if they have a discretion, and have exercised it bonâ fide and without negligence, they are not responsible. Perhaps they are not liable for an indiscreet exercise of their discretion. But it is impossible to say that, because the trustees have a discretion as to the time and manner of repairing, they cannot be made responsible for negligence. The first count alleges that "the defendants had in their hands funds produced by the duties sufficient for the maintaining, cleansing, supporting, and preserving the

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(a) Which enacts,—“That all the monies which shall be collected, levied, borrowed and raised under this Act, &c., shall be applied in any order with respect to priority of such application as to the said trustees shall seem expedient and proper (except, &c.) in paying and defraying the charges and expenses of obtaining this Act, and in paying the expenses and charges of collecting the rates and duties, and all interest due and to grow due from time to time on monies borrowed or taken up at interest by the said trustees, and any principal monies that may be called in from time to time, and in the general management and conducting of the said trustestate, in the construction of the works by this and the said former Acts

authorized to be erected, established and maintained, in supporting, maintaining, and repairing the same and every part thereof, and in carrying into execution all the provisions of the said several recited Acts and this Act, and in paying off and discharging the whole or any part of the present bond or other debt, and any future bond or other debt, and all interest due and to grow due thereon, and also in defraying, paying and satisfying all the charges and expenses already incurred or hereafter to be incurred in carrying into execution the several purposes of, or under or in consequence of any of the clauses, provisions, powers, or authorities contained in the said former Acts or this Act.”

(b) See vol. 1, p. 442, note (a).



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docks, in addition to the satisfaction and discharge of all other charges, &c. of which the defendants had notice : Yet the defendants did not take due and reasonable or any care in maintaining, cleansing, supporting and repairing the said docks." The defendants are thereby charged with not having exercised their discretion. The second count charges the defendants with negligence ; it closely resembles that in *Parnaby v. The Lancaster Canal Company (a)*. The 18 & 19 Vict. c. clxxiv. s. 25 (b) shews that the Legislature considered that the trustees were liable for negligence such as is charged in the count, and the 6 Geo. 4, c. clxxxvii. s. 134 (c) provides for the payment of the amount of any damage out of the funds of the corporation. On that ground the case of *Metcalfe v. Hetherington (d)* is distinguishable from the present. The judgment in that case does not point to a declaration charging negligence. The principle of that case might be applicable if the declaration in this case was for not applying the funds.— (He also argued that the defendants were liable for the acts of the committee ; but as this point was abandoned by the defendants' counsel, who desired to have the opinion of the Court on the general question, no judgment was given upon it, and the argument is therefore not reported.)

*Quain*, for the defendants.—The defendants are not liable to be sued. They are trustees managing the docks

(a) 11 A. & E. 223.

(b) Which empowers the trustees to run dry the docks for the purpose of repairs and to remove any vessel, "or to give reasonable notice to the master, &c., of such vessel to remove the same out of the said dock \* \* And in case the said vessel shall not be removed

after such notice, the trustees shall not be responsible for any damage caused to the said vessel or any cargo therein, by reason of their letting the dock, in which such vessel shall be lying, run dry, as aforesaid," &c.

(c) See vol. 1, p. 442, note (c).

(d) 11 Exch. 257.

for the benefit of the public. They are a corporation, but there are no shareholders, no stock and no dividends. As soon as the income exceeds the expenditure the trustees are bound to reduce the rates: 51 Geo. 3, c. cxliiii. s. 27. *Hall v. Smith* (a) and *Sutton v. Clarke* (b) shew that there is a distinction between the liability of trustees for public purposes and other persons. The cases in which such trustees are held liable to actions are where they have been guilty of misfeasance, or negligence in doing some act in an improper manner, not for the mere omission to do a particular act. Here the first count does not shew that the trustees had funds which they were *compellable* to apply in cleansing the docks. It is consistent with this count that they may have retained funds for the construction of lighthouses, or other public works which they have a right to execute. No legal duty for the breach of which an action at law would lie is shewn to have existed. At most there was a trust enforceable in equity. The entrance into the docks is a public highway. Suppose it had been a turnpike road, no action would have lain against the trustees for leaving such an obstruction as that in the present case. By 11 Geo. 2, c. 32, s. 14, the defendants are empowered to set up lamps along the quays. By 6 Geo. 4, c. clxxxvii. s. 72, they may erect light-houses for the safety of vessels navigating to or from the port. Could it be contended, if the trustees thought that at particular points lamps or light-houses were not required, that they could be made liable for an accident occasioned by the want of such lights, because a jury might choose to say that there was negligence in not providing lamps or light-houses? [*Crompton, J.—Pardoe v. Price* (c) shews that

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(a) 2 Bing. 156.

(b) 6 Taunt. 29.

(c) 16 M. &amp; W. 451.

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though an act of parliament may direct that money shall be applied in a particular manner, the nonapplication of it in such manner does not necessarily give a right of action, where the relation of the parties to the action is that of trustee and cestuique trust.] Here the defendants are empowered to erect cranes by 51 Geo. 3, c. cxliii. s. 78; to provide life boats by 6 Geo. 4, c. clxxxvii. s. 68. They are compellable to make accommodation for steamboats by 6 Geo. 4, c. clxxxvii. ss. 65, 66, and to make a landing slip at St. George's Pier by 7 & 8 Vict. c. lxxx. s. 114. How can it be said that the trustees are liable to an action if they secure money for executing these works before cleansing the dock? Suppose, Docks A. and B. being out of repair, the defendants choose to repair Dock A., and a ship goes into Dock B. and is injured, it is surely not a question for a jury which dock the trustees ought to have first repaired. They have a discretion to exercise as to the application of the funds, which cannot be controlled by the verdict of a jury: *Metcalfe v. Hetherington* (a). The 130th section of the 6 Geo. 4, c. clxxxvii. does not impose on the trustees any legal duty for the breach of which an individual who has sustained damage can maintain an action at law. The principle established by the authorities is, that where a duty is imposed by statute or arises from a grant by the Crown, the remedy for the breach of it is by indictment or mandamus; and an individual can only maintain an action in respect of a peculiar damage sustained by him: *Henley v. The Mayor of Lyme Regis* (b), *Russell v. The Men of Devon* (c), *M'Kinnon v. Penson* (d). Here no indictment or mandamus could be supported for not

(a) 11 Exch. 257.

1 Bing. N. C. 222.

(b) 3 Bing. 91; S. C. in error,

(c) 2 T. R. 667.

3 B. & Adol. 77; In Dom. Proc.

(d) 9 Exch. 609.

cleansing the dock: *Rex v. The Inhabitants of Netherthong* (a), *Regina v. The Trustees of the Oxford and Witney Turnpike Roads* (b): and the only remedy is in a court of equity by information at the suit of the Attorney General for the breach of trust. *Pardoe v. Price* (c), *Edwards v. Lowndes* (d) and *Regina v. The Trustees of the Balby Turnpike Road* (e) are authorities that the clauses in question do not create any legal duty as regards the trustees and the public at large, but merely the relation of trustee and cestui que trust. Moreover, the declaration charges mere acts of nonfeazance, and there is no authority that in such case trustees are liable to an action. *Sutton v. Clarke* (f) decided that if a person who, in the exercise of a public function without emolument, which he is compellable to execute, acting without malice and according to his best skill and diligence, and obtaining the best information he can, does an act which occasions consequential damage to a subject, he is not liable to an action for such damage. That principle has been adopted in subsequent cases; and it is now well established that trustees of public roads are not responsible for an injury occasioned by the negligence of the men employed in making or repairing the road: *Hall v. Smith* (g), *Humphreys v. Mears* (h), *Duncan v. Findlater* (i), *Harris v. Baker* (k). Indeed, the legislature has protected trustees of roads from liability when acting within the scope of their authority: 7 & 8 Geo. 4, c. 24, ss. 2, 3. The judgment in *The Lancaster Canal Company v. Parnaby* (l) proceeded on the ground that the Company made the canal for their profit, and

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(a) 2 B. &amp; Ald. 179.

(b) 12 A. &amp; E. 427.

(c) 16 M. &amp; W. 451.

(d) 1 E. &amp; B. 84.

(e) 22 L. J., Q. B. 164.

(f) 6 Taunt. 29.

(g) 2 Bing. 156.

(h) 1 Man. &amp; R. 187.

(i) 6 Cl. &amp; F. 894.

(k) 4 M. &amp; Sel. 27.

(l) 11 A. &amp; E. 223.

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opened it to the public on payment of tolls, and that therefore the law imposed on them a duty to take reasonable care that the public might navigate it without danger to their lives or property. Here the breach of duty alleged is an omission to cleanse the dock, and the trustees had a discretion as to whether they would apply the funds for that purpose. The argument for the plaintiff must go to this extent, that if the defendants were empowered by act of parliament to construct a new dock they would be liable to an action for breach of duty in not doing so.

*Cleasby*, in reply.—The declaration does not charge the defendants with a simple nonfeasance, but with the omission of something which it was their duty to do. They were bound to take reasonable care that the dock was fit for navigation. They are a corporation receiving tolls for corporate purposes, and therefore stand in the same position as individuals: *Scott v. The Mayor of Manchester* (a). They may borrow money on bond to the extent of one million: 6 Geo. 4, c. clxxxvii. s. 126; and they are authorised to pay damages occasioned by the insufficiency of their works or the negligence of their servants: sect. 134. Then why should they not pay, when the damage is occasioned by their own neglect? By sect. 136, damages may be levied by distress. The 18 & 19 Vict. c. clxxiv. s. 25, which empowers the trustees, for the purpose of cleansing, to let the docks run dry and remove vessels therefrom, contemplates a liability for neglect to cleanse. The case falls within the principle of *The Lancaster Canal Company v. Parnaby* (b). The cases as to trustees of roads are inapplicable, because the defendants are a corporation created for a particular purpose and receiving tolls for that purpose.

(a) 1 H. & N. 59.

(b) 11 A. & E. 223.

There is no authority that trustees acting gratuitously for public purposes are not responsible for their own negligence, where an individual sustains a peculiar damage. In some of the cases referred to, the question has been whether the trustees employed persons of competent skill, in others whether they personally interfered. *Leader v. Moson* (a) affords an answer to the argument that there can be no negligence where there is a discretion. There is as much negligence in nonfeasance as misfeasance. The keeping the dock in a dangerous state, knowing that it is so, is equivalent to a positive act.

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*Cur. adv. vult.*

The judgment of the Court was now delivered by

COLERIDGE, J.—In this case the plaintiffs, as the owners of a cargo of guano on board a ship called the “Sierra Nevada,” seek to recover damages from the defendants, the Trustees of the Liverpool Docks, for an injury done to the cargo, by reason of the ship having struck a bank of mud lying in and about the entrance of the dock, as she was endeavouring to enter it. This complaint is put forward in two ways by the declaration. First, it is alleged that the trustees are the proprietors of the dock which was made by them under the powers of the statute 7 & 8 Vict. c. lxxx. and that under that act and other acts they receive from vessels certain tolls, which under the said Acts they are bound, and it is their duty to apply in and about, amongst other things, the maintaining, cleansing and supporting the dock so as to be in a state fit for vessels entering and navigating the same. It is then averred that the funds in the hands of the defendants arising from the said tolls were fully sufficient for the maintaining, cleansing and supporting

(a) 2 W. Black. 924.

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the docks, in addition to the satisfaction and discharge of all other liabilities and incumbrances in and about the same. And it is then charged that the defendants did not take reasonable or ~~any~~ care in or about maintaining, &c., the dock, insomuch that the vessel struck on the mud, which by the negligence of the defendants lay at the entrance of the dock, and in consequence thereof the cargo was damaged. Secondly, it is complained against the defendants, that they, well knowing that the dock and the entrance thereto were, by reason of accumulated mud, in an unfit state to be navigated and used by vessels then accustomed to navigate and use the same, did not take reasonable, or any care to put the same into a fit state for that purpose; but negligently permitted the dock and the entrance thereof to continue, while the same was, by their permission, navigated and used by such vessels, in an unfit state for want of reasonable cleansing, insomuch that the vessel in question, being such vessel as was used and accustomed to navigate and use the dock, in endeavouring to enter, struck against the bed of mud and was damaged, together with the cargo.

The defendant having demurred to this declaration, the question whether it disclosed any good cause of action was argued in the Court of Exchequer and decided in the negative, partly on the ground that by the 6 Geo. 4, c. clxxxvii. s. 3, a committee was to be elected, to the members of which exclusively the powers of the trustees were transferred, so that the latter could not be made liable for neglecting to do an act which they had not the power to do, and partly on the ground that, even if the trustees had been the persons appointed to do the act, they were not liable to an action, because they had a discretionary power, the exercise of which could not be controlled or questioned.

On the argument before us the counsel for the defendants

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abandoned the former ground of objection and desired to have the question of liability decided on the latter ground alone. And in support of it, he contended that the defendants, being a corporation created by statute and deriving no emolument from, or remuneration for, the performance of their statutory duties, and having a discretion as to the application of the funds received by them, could not be made liable in an action at law for not choosing to exercise their discretion at any particular time, by spending the funds in removing the accumulation of mud. And the case of *Metcalfe v. Hetherington* (a) was relied on (as it had been by two of the Barons) as governing the present. In that case the two first counts of the declaration sought to charge the defendants, as trustees of the harbour of Maryport, for the default of the harbour master; and the Court of Exchequer held that these counts were bad. This decision as to these counts has no application to the present case, because it is not sought in this action to make the trustees liable for any default but their own. But there was a third count in *Metcalfe v. Hetherington* charging the trustees with negligence in the preservation and keeping of the harbour and improperly suffering rubbish to accumulate therein, contrary to their duty, whereby it became unsafe, and the plaintiff's vessel, being lawfully therein, was thereby damaged: and the Barons held that this count also was bad in substance; first, because there was no averment that the trustees had received funds where-with to keep the harbour clear of rubbish; and, secondly, on the ground that the Legislature had reposed in them an absolute discretion (with certain exceptions) to dispose of the funds arising from the tolls in maintaining the harbour, so that, although the harbour wanted cleansing, they might apply the surplus in their hands to the repairs of the piers,

(a) 11 Exch. 257.



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to deepening the mouth, and similar purposes if they thought those objects more pressing and of more advantage to the harbour than keeping the bottom clean. The former of these two grounds of decision does not apply to the present case, inasmuch as the declaration in this action does contain an averment that the defendants had received sufficient funds. And it may be questioned whether the latter ground is not also inapplicable, because the declaration avers, not merely that the trustees had funds sufficient to enable them to remove the mischief complained of, but also to perform their entire duty of maintaining, cleansing, supporting and preserving the docks, in addition to the satisfaction of all other charges, liabilities and incumbrances in and about the same. It may be doubted, we think, whether, coupling this averment with the allegation of the knowledge by the trustees that the entrance to the dock was dangerous, a state of facts is not shewn under which they had a positive duty to perform, and not merely a discretion to exercise, as to removing the danger. But at all events we think that, if they had a discretion under the circumstances to let the danger continue, they ought, as soon as they knew of it, to have closed the dock to the public; and that they had no right, with a knowledge of its dangerous condition, to keep it open and to invite the vessel in question into the peril which they knew it must encounter, by continuing to hold out to the public that any ship, on payment of the tolls to them, might enter and navigate the dock. The case of *The Lancaster Canal Company v. Parnaby* (a) establishes that the defendants would have been responsible under such circumstances if they had had a beneficial interest in the tolls when received; and we do not think the principle of that decision inapplicable, because the defendants in the

present case received the tolls as trustees. The duty, in our opinion, is equally cast on those who have the receipt of the tolls and the possession and management of the dock vested in them, to forbear from keeping it open for the public use of every one who chooses to navigate it on payment of the tolls, when they know it cannot be navigated without danger, whether the tolls are received for a beneficial, or for a fiduciary purpose; and for the consequences of this breach of duty we think they are responsible in an action. We are therefore of opinion that the judgment should be reversed.

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Judgment reversed.

## IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

LINDUS v. MELROSE and Others.

Feb. 23.

THIS was an appeal from the judgment of the Court of Exchequer in this case, which is reported, 2 H. & N. p. 293.

The following promissory note was signed by three persons describing themselves as "directors" of a Joint Stock Company, incorporated, with limited liability, under

*Manisty* argued for the appellant (a). — The note is binding on the defendants personally. It is reasonable

the 19 & 20 Vict. c. 47, and was countersigned by one G., who described himself as secretary of the Company. "London, Dec. 31, 1856. Three months after date we jointly promise to pay 8. or order six hundred pounds for value received in stock on account of the L. and B. Company, Limited."—*Held*, in the Exchequer Chamber, (affirming the judgment of the Court of Exchequer), that the directors who signed it were not personally liable upon the note.—*Dabitanibus Crompton, J., and Willes, J.*

(a) In Michaelmas Vacation, *Cresswell, J., Williams, J., Crompton, J., Crowder, J., and Willes, J.*  
Nov. 25. Before *Coleridge, J.*

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to suppose that parties supplying goods to a Company with limited liability, would prefer the individual responsibility of the directors. The directors on the other hand might reasonably undertake such a responsibility jointly. The note is countersigned by the secretary because it would go through the Company's books, and as between the directors and the Company would have to be provided for by the Company. If the defendants did not intend to make themselves liable, they should have said "the Company promise to pay." [*Crompton, J.*—If the directors intended to sign on account of the Company, the words "on account of The London and Birmingham Hardware Company, Limited," would form part of the signature.] The word "jointly" is not applicable to the case where directors sign on behalf of an incorporated Company. It would be otherwise if this was a note made by the directors of an unincorporated body. Therefore, reading this note in its natural sense, it is the joint note of the parties signing it, and there is no reason why a presumption should be made against the liability of persons signing a promissory note of this kind. The note is not made in accordance with the 19 & 20 Vict. c. 47, s. 43.—(In addition to the cases cited in the Court below, he referred to *Halford v. Cameron's Coalbrook Steam Company (a)*, *Edwards v. Cameron's Coalbrook Steam Company (b)*.)

*Bovill* (with whom was *J. Brown*), for the appellants.—It is clear that it was not the intention of the defendants to make themselves personally liable upon this note. For the purpose of the present question it is not enough to shew that the note is not made in accordance with the 19 & 20

(a) 16 Q. B. 442.

(b) 6 Exch. 269.

Vict. c. 47, s. 43. Possibly the note is invalid. The note shews an intention that all the shareholders should be bound: *MacLae v. Sutherland* (a), *The Bank of Australasia v. Breillat* (b). [*Willes*, J.—In those cases the Company was not incorporated. *Crompton*, J.—In *Leadbitter v. Farrow* (c), Lord *Ellenborough* says:—Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it *for* another, or by procuration of another, which are words of exclusion? Unless he says plainly “I am the mere scribe,” he becomes liable.” Here, if the words “on behalf of,” &c., could be read as part of the signature, the case would be clear.]

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*Manisty*, in reply.—This is a case for the application of the rule, that the language used by a person shall always be taken most strongly as against himself.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

COLERIDGE, J.—This was an appeal from the decision of the Court of Exchequer, by which a rule was made absolute for entering a verdict for the defendants. The action was against the defendants as the makers of a promissory note for 600*l.*, and two of the defendants, Melrose and Harris, pleaded that “it was not their note as alleged.” The third, Wood, had suffered judgment by default. The question for determination is, whether the note made the

(a) 3 E. & B. 1.

(b) 6 Moo. P. C. 152.

(c) 5 M. & Sel. 345.

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defendants personally liable, or only bound the Joint Stock Company of which they were directors.

The note was in the following form :—

“ £600.

“ London, Dec. 31, 1856.

“ Three months after date we jointly promise to pay Mr. Frederick Shaw or order six hundred pounds for value received in stock on account of the London and Birmingham Iron and Hardware Company, Limited.

|                                |              |              |
|--------------------------------|--------------|--------------|
| Payable at the London          | Jas. Melrose | } Directors. |
| Joint Stock Bank Company,      | G. N. Wood   |              |
| Princes Street, Mansion House. | John Harris  |              |

Edwin Guess, Secretary,”

(Indorsed F. Shaw).

The Company had been established under the 19 & 20 Vict. c. 47, and by the 43rd section of that Act it is provided, “that a promissory note or bill of exchange shall be deemed to have been made, accepted or indorsed on behalf of any company registered under this Act, if made, accepted or indorsed *in the name of the company*, by any person acting under the express or implied authority of the company.”

The note in question certainly does not satisfy the requisitions of this section; but it does not therefore follow conclusively that the directors are personally liable; for the case was properly argued and must be decided on what appears to be the expressed intention of the makers of the instrument. Does the language used import that they take upon themselves personally the liability to pay the note?

Now, strictly confining ourselves to what is apparent

on the face of the note or to be reasonably collected from it, we think the intention is clear. If the words "for value received in stock" be read as in a parenthesis which was suggested in the Court below as the proper mode, there is then a promise to pay expressly on account of the Company, and this promise is made by the directors, describing themselves as directors, and the promise is countersigned by Edwin Guess, describing himself as secretary. Any one reading such a note and bringing to it the ordinary knowledge which must be presupposed, would assuredly conclude that the note was made by the defendants as officers, and not as individuals,—they promise on account of the Company—they sign as directors—and their signature is countersigned by a secretary.

But if the words "for value received in stock" be read, not as in a parenthesis, but as immediately connected with the words that follow them, still the meaning does not appear to us altered; and though it may not be so clear as before, yet a new argument then arises pointing to the same conclusion; for then the whole consideration is more distinctly shewn to have been received by the Company. A promise to pay by officers of the Company on its account would be reasonable. But why should individuals signing as officers be supposed to make themselves personally liable without any apparent consideration?

There is, however, a word in the note, to which importance is attached as favouring another conclusion, viz, the word "jointly;" and if, as in one or two of the cases cited on the argument, the expression had been "jointly and severally," it would have been difficult to resist the conclusion that the promise was a personal one, for in what other character would the directors promise "severally." But the inference is by no means so strong from the ex-

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pression "jointly" alone. It is by no means inconsistent with an official promise that it should be joint; it is, after all, but an expression of the quality which the promise, not being several, must in fact possess. My brothers *Crompton* and *Willes* entertain considerable doubt upon the construction of the instrument, not however sufficiently strong to induce them to dissent from the judgment of the Court; although they are anxious to guard against its being supposed that in the judgment we pronounce we intend to throw any doubt upon the rule, that an agent putting his name to a mercantile instrument is liable as a principal, unless the instrument distinctly shews that he signs as agent; or that we mean to break in upon the rule "*verba fortius accipiuntur contra proferentem*," which however ought to be applied only where other rules of construction fail.

In these remarks of my brothers we entirely concur.

Many cases were cited on the argument, but we do not think it necessary now to go through them, for each depends on its own circumstances, and this must be decided on the same principle. We are of opinion that the judgment must be affirmed.

Judgment affirmed.

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## IN THE EXCHEQUER CHAMBER.

*(Appeal from the Court of Exchequer.)*

THE GREAT WESTERN RAILWAY COMPANY v. CROUCH.

Feb. 23.

THIS was an appeal from the judgment of the Court of Exchequer.—The pleadings and judgment in the Court below will be found in 2 H. & N. 491.

The case stated on appeal was as follows:—

The plaintiff was and is a carrier residing in London, a part of whose business consisted in collecting small parcels, packing them in one parcel and so forwarding them to their place of destination, addressed to an agent of the plaintiff who there distributed the small parcels according to their respective addresses.

The Great Western Railway Company were and are the owners of the Great Western Railway extending from the

The plaintiff delivered in London to the defendants, who were common carriers, a parcel addressed to the plaintiff's agent at Plymouth. The defendants' railway terminates at Bristol, from whence they forwarded the parcel to Plymouth by the South Devon Railway, and shortly before noon, on the day of its

arrival, a porter tendered it to the plaintiff's agent, who refused to pay the sum charged for its carriage, whereupon the porter took it away, saying that it would be returned to London; and it was accordingly sent back to London at eight o'clock in the morning of the following day. About two hours afterwards the plaintiff's agent tendered at the office of the South Devon Railway the amount of the carriage and demanded the parcel, when he was told that it had been that morning returned to London. The parcel remained in the custody of the defendants at their office in London, and it did not appear that the plaintiff had applied for it there. The jury found that the parcel was sent back to London unreasonably soon; and that the demand of the parcel and tender of the charge for the carriage was made within a reasonable time after the parcel had been refused.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that, under these circumstances, the defendants were liable for a breach of duty, even supposing their duty *qua* carriers ended with the tender of the parcel: *Per Cockburn, C. J., Crompton, J., Williams, J., and Wiles, J. Crowder, J., dissentiente. Wightman, J., dubitante.*

Also that there was no evidence of a conversion: *Per Crowder, J., and Wightman, J.*  
A declaration stated that the plaintiff delivered to the defendants, as common carriers, a parcel to be carried by them from London to Plymouth, and alleged as a breach the nondelivery of the parcel to the plaintiff at Plymouth. The defendants pleaded a tender on payment for the carriage, but that the plaintiff refused to pay the amount, whereupon the defendants refused to deliver the parcel. The plaintiff replied that within a reasonable time after the defendants had tendered the parcel, he offered at Plymouth to pay for its carriage and requested the defendants to deliver it, but they refused to deliver it at Plymouth. The defendants having taken issue on this replication, the jury found that the allegations in it were proved.—*Held*, that if the circumstance of the defendants having sent back the parcel to London afforded an excuse for its nondelivery, that should have been specially rejoined: *Per Wightman, J.*



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Paddington station London to Bristol, from which latter place to Plymouth the communication by railway is over the Bristol and Exeter Railway and the South Devon Railway. The Great Western Railway Company, at the times in question, were common carriers of goods for hire from London to Plymouth over the above railways. The Great Western Railway Company had no other agents at Plymouth to deliver goods and receive the carriage charges except the South Devon Railway Company, who performed these offices for them.

On the 26th day of July, 1856, the plaintiff delivered the parcel of goods in question at the booking office of the "Swan with Two Necks" in the city of London, kept by Messrs. Chaplin & Horne, where parcels were received to be carried by the Great Western Railway Company. The parcel was addressed "To Mr. Reynolds, Plymouth," and was to be carried to Plymouth by the Great Western Railway Company and there delivered to Mr. Reynolds, who was the plaintiff's agent at Plymouth. The parcel was delivered as an ordinary parcel and was marked with the sum of 1s. 6d., being the ordinary carriage of such a parcel to Plymouth, but being afterwards discovered to be a packed parcel this sum was altered and the sum of 2s. 3d. marked instead thereof. An agreement was come to at the trial by admitting that 2s. 3d. was the correct charge for the parcel in question, and such admission was made by the plaintiff accordingly, and the fact is to be so taken for the purposes of this case.

The parcel was accordingly carried or forwarded by the Great Western Railway Company to Plymouth, where it arrived in due course on Monday the 28th of July. Shortly before noon of that day, it was in the usual way taken on for delivery by the railway porter of the South Devon Railway Company, and tendered for delivery at the place of business of Mr. Reynolds to a man named Morgan

employed by Reynolds in his business; Reynolds was not then at his place of business. The porter demanded the sum of 2s. 3d. for the carriage which Morgan refused to pay, but offered to pay the sum of 1s. 6d. as the proper amount of carriage. This latter sum was refused by the porter, who informed Morgan that the parcel would be returned to London if the charge of 2s. 3d. was not paid. Payment being still refused, the parcel was taken by the porter back to the railway station of the South Devon Railway Company at Plymouth, and was sent off to London by the South Devon Railway Company by the train which left Plymouth at eight o'clock in the morning of the following day.

About two hours after the parcel had been so sent off to London, the sum of 2s. 3d. was, under protest, tendered by Morgan, by the direction of Mr. Reynolds, to the clerk of the South Devon Railway Company at Plymouth, and the parcel demanded of him. The clerk informed Morgan that the parcel had that morning been returned to London. The parcel, being as aforesaid returned to London, arrived in due course at the Paddington station of the Great Western Railway Company, and there remained in the care of the Great Western Railway Company until the trial of the cause.

In answer to questions put to them by the Lord Chief Baron, the jury found that the parcel was sent back to London unreasonably soon; and that the parcel ought not to have been sent back to London; and that the demand of the parcel and tender of the 2s. 3d. were made within a reasonable time after the parcel had been refused: whereupon the Lord Chief Baron directed a verdict to be entered for the plaintiff with 19l. 17s. damages, being the value of the parcel as found by the jury; leave being reserved to the defendants to move to enter the verdict for them.

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On the 21st day of April, 1857, a rule nisi was obtained to enter the verdict for the defendants, or for a new trial, on the grounds that the defendants having carried the parcel and tendered it at Plymouth to the plaintiff in due course, and the plaintiff having refused to pay the amount of the carriage, the defendants were not liable; and that there was no duty or obligation on the defendants or the South Devon Railway Company to keep the parcel at Plymouth after the plaintiff's refusal to pay the carriage: that if the act of sending back the parcel to London was wrongful it was the act of the South Devon Railway Company, and that the defendants would not be liable for such act on their part; and that the verdict was against the evidence on the questions left to the jury as to the unreasonableness of sending back the parcel to London.

This rule having been argued, it was decided by the Court of Exchequer that the verdict found for the plaintiff, so far as it related to the issue found on the first replication to the defendants' third plea, should be set aside, and a verdict entered on such issue for the defendants; and that as to the residue of the said rule the same should be discharged.

The defendants having appealed against that decision, the case was argued in the present Vacation (a) (Feb. 4) by

*Bovill*, for the appellants.—The duty of the defendants as carriers, was simply to perform what they agreed to do, viz., to take the parcel to its destination. When they had done that, there was a reciprocal duty on the part of the plaintiff, to be willing to receive the parcel and pay the defendants' charge for its carriage. The plaintiff broke his contract, and now contends that he thereby imposed a fresh obliga-

(a) Before *Cockburn*, C. J., *J., Crompton*, J., *Crowder*, J., *Wightman*, J., *Erle*, J., *Williams*, and *Willes*, J.

tion on the defendants. In the first count the defendants are charged as if they still continued possessed of the parcel as carriers; in which case they would be liable to all the risks to which an insurer is subject. There is no authority that, after a tender of goods at their place of destination, a carrier continues liable to that extent. The defendants kept possession of the parcel in exercise of their right of lien. [*Cockburn*, C. J.—If that be so, were they not bound to be ready to deliver it on payment of their charge?] The defendants were willing to have done so. [*Cockburn*, C. J.—In London, but not in Plymouth, where they had agreed to deliver it.] There is no rule that a person who has a lien must keep the goods in any particular place. [*Williams*, J.—That may be so; but, if satisfaction is tendered, he must redeliver the goods.] The defendants had a right to take back the parcel to London, or to any warehouse of their own for the convenience of keeping it as warehousemen. [*Erle*, J.—Suppose a consignment of diamonds to a small roadside station, it could hardly be contended that the company must keep them at such a station after the refusal on the part of the consignee to accept or pay for the parcel.] In Story on Bailments, sect. 538, it is said: "As soon as the goods have arrived at their proper place of destination and are deposited there, and no further duty remains to be done by the carrier, his responsibility as such ceases." Sect. 541 shews what is meant by the words "place of destination:" it says "On the other hand, however universal the custom may be to deliver the goods to the owner at the place of destination, still the parties may by their contract (a) waive it; and, if they do, the carrier is discharged. As if the owner, after the arrival of the goods, requests the carrier to let them remain in his warehouse until the owner

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(a) Quære, "conduct."

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can conveniently send for them, and they are there deposited, and are afterwards destroyed by fire; the duty of the carrier being at an end he is not responsible for their loss in that character." In sect. 542 it is said: "The material consideration is whether the owner of the goods has taken any conclusive possession of them, or has terminated the custody of the carrier by any act or direction which does not flow from the duty of the carrier. So long as the carrier retains the possession of the goods, or is to perform any further duty either by custom or contract *as carrier*, he is responsible for their safety. But, when the transit is ended and the delivery is either completed or waived by the owner, then the responsibility of the carrier ceases." Here the plaintiff, by refusing to receive the parcel and pay the carriage, waived the delivery according to the original contract. [*Crompton, J.*—Surely it was no waiver of delivery when Reynolds's servant refused to pay what he considered an excessive charge.] In *Storr v. Crowley (a)*, *Alexander, C. B.*, said, "It appears to me to be sufficiently proved by the cases, as a general rule, that a carrier having once tendered a delivery has discharged himself of his obligation." *Garrow, B.*, in the same case said, "I should think that contracts of this nature would be performed generally by a tender at the house, and that the parcel might be carried away if the money were not then ready." On the refusal of a consignee to accept goods, if the carrier has any duty, it is to keep the goods for the consignor: *Stephenson v. Hart (b)*. In *Ostrander v. Brown (c)*, *Platt, J.*, in delivering the judgment of the Court, said: "Admitting then, that the wharf was the place of delivery, a mere landing the goods on the wharf was no delivery . . . A tender merely

(a) *M'Clel. & Y.* 129; see (c) 15 *Johnson (New York)*, pp. 136, 137. 39; see p. 42.

(b) 4 *Bing.* 476; see p. 486.

of the goods to the consignees, without their acceptance, would not be a performance of the carrier's duty in such a case. Suppose the consignees had been dead or absent, or had refused to receive the goods in store, what would have been the carrier's duty? Certainly he would have no right to leave them at the wharf or in the street without protection. He would not be justified in abandoning the goods. He had had notice that S. & B. were the owners; if M. & O. would not take charge of the goods as consignees, he ought to have secured them on board his vessel or in some other place of safety, and that would have entitled him to his freight with all other extra charges." [Erle, J., referred to the judgment of Bramwell, B., in *Hudson v. Baxendale* (a).] All that the defendants were bound to do was to take care of the parcel. [Williams, J.—The peculiarity of the case is that, by sending the parcel back to London, the defendants undid the act by which they acquired their lien.] The obligation of the defendants as carriers being at an end, they had a right to take the parcel back to London, to be ready to deliver it to the consignor, even if they were not bound to do so. As to the count in trover, the plaintiff never paid or tendered the charge to the defendants, but only to the South Devon Railway Company after the parcel had been returned to the defendants. There was therefore no conversion. [Crompton, J.—The responsibility arising upon the bailment was to return the parcel within a reasonable time upon a reasonable request. If the defendants put it out of their power to return the parcel upon reasonable request, that was a breach of the bailment.] What is a reasonable time is a matter of law. [Crompton, J.—The question of reasonableness of time must be for the jury, according to the circumstances of each particular case.] The only time within which a

(a) 2 H. & N. 575.

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tender to the South Devon Railway would have been reasonable was while the parcel remained in their possession. [*Cockburn, C. J.*, referred to *Muschamp v. The Lancaster and Preston Railway Company (a)*.] The South Devon Railway Company are only the agents of the defendants as to matters relating to their character as carriers, not as warehousemen. Such a refusal to deliver as that here proved does not amount to a conversion: *Alexander v. Southey (b)*, *Canot v. Hughes (c)*. Merely dealing with the goods in a manner not consistent with the defendants' duty is not a conversion: *Heald v. Carey (d)*. [*Crompton, J.*—How is this distinguished from the case of a misdelivery? *Wightman, J.*—The goods are kept in an inconvenient place, but they are kept for the bailor. In the case of misdelivery they are not kept at all for the bailor. *Cockburn, C. J.*—The defendants assert a right which is inconsistent with a delivery to the owner.]

*J. Brown* (with whom was *Holl*), for the respondents.—The plaintiff is entitled to maintain the action. There may be a distinction where the consignee repudiates the goods altogether, and where he only refuses to pay the sum charged by the carrier as being excessive. A refusal to receive a parcel does not amount to a gift of it in law; but the property remains in the consignee or consignor as the case may be. Here the refusal to pay the sum demanded did not discharge the defendants from the performance of their contract: *Bac. Abr. "Tender," (F.)*, *Brikhed v. Wilson (e)*; and the defendants were bound to be ready to deliver the parcel at Plymouth when the money was tendered. A carrier, by taking back goods, might destroy them as effectually as if

(a) 8 M. & W. 421.

(b) 5 B. & Ald. 247.

(c) 2 Bing. N. C. 448.

(d) 11 C. B. 977.

(e) *Dyer*, 24 b.

he had thrown them into the sea. If the original contract is determined by the tender of the goods, it is difficult to say at what place the carrier is afterwards bound to deliver them. In *Storr v. Crowley* (a) this point was raised but not decided, the Court considering that, under the circumstances, there was a continuing contract to deliver the goods to the consignee. [Cockburn, C. J.—If your proposition be correct, the contract is not only to carry but to deliver at the house of the consignee, which may be at a distance from Plymouth.] If the carrier did nothing, probably his responsibility would be determined by the consignee's refusal to accept the goods, but when the carrier insists upon keeping them until his charges are paid, he subjects himself to a continuing duty: the right of lien and the obligation to deliver are correlative. [Erle, J.—He may determine his contract as carrier although his responsibility as warehouseman may remain. If he holds the goods as carrier, where is he obliged to warehouse them?] Mere possession does not give a lien: it arises out of the employment as carrier, and it ceases upon the ceasing to be a carrier. There may be an alteration in the risk though not in the duty as regards the delivery of the goods. In *Story on Bailments*, § 122, it is said,—“If the depositary improperly refuses to re-deliver the deposit when it is demanded, he henceforth holds it at his own peril. If, therefore, it is afterwards lost, either by his neglect or by accident, it is his own loss; for he is answerable for all defaults and risks in such cases.” Although the consignee, by his refusal to pay the carriage, discharges the carrier from his risk as insurer, yet the carrier's duty to deliver, according to the original contract, continues. [Cockburn, C. J.—Suppose the analogous case of goods sold upon the terms that the

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(a) M'Clel. &amp; Y. 129.



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vendor shall keep them until they are paid for: if the vendor demands the money, and the vendee is not ready to pay it, has the former any further duty to perform?] A carrier has a remedy by action for the extra expense of warehousing and delivering the goods. But supposing the defendants were not bound to take the parcel again to the office of the plaintiff's agent, they had no right to send it back to London. If so, they might have sent it to Edinburgh or Paris. The fact of the plaintiff's agent being wrong in refusing to pay the carriage, did not justify the defendants in sending the parcel to a distant place. The plaintiff cannot be in a worse situation than a person who wrongfully places goods on the land of another, in which case the latter must remove them to a convenient distance: *Forsdick v. Collins* (a). A person may abate a nuisance, but in so doing he is bound to take care that he does no unnecessary damage. The same principle pervades the criminal law: in repelling force no unnecessary violence must be used. The defendants should have been ready to deliver the parcel at the most reasonable and convenient place; and the jury have found that it was unreasonable to take it back to London. It is immaterial whether there was a liability to deliver at Plymouth or whether there was a mere bailment; if the latter, the bailment was at Plymouth not in London. In *Story on Bailments*, § 117, it is said,—“The next inquiry is as to the place where restitution is to be made. If a particular place is agreed on between the parties, that of course is to regulate the matter (b). If no place is agreed on, the property ought to be restored at the place where it is found or where it ought to be kept. *Depositum eo loco restitui debet, in quo sine dolo ejus est apud quem depositum est*;

(a) 1 Stark. N. P. 173.

Code Civil of France, Art. 1942;

(b) Dig. Lib. 16, tit. 3, l. 12;  
 Pothier, *Traité de Dépôt*, n. 56;

Code of Louisiana (1825), Art.  
 2924.

ubi vero depositum est nihil interest" (a). *Hudson v. Baxendale* (b) shews that where goods are refused by the consignee the carrier is bound to do what is reasonable. Here it was not reasonable, under the circumstances, to send the parcel so soon to London. Time should have been allowed for the agent of the plaintiff to communicate with him: *Gibbs v. Stead* (c). In *Garside v. The Proprietors of the Trent and Mersey Navigation* (d), the carrier's responsibility as an insurer was at an end, and he merely held the goods as a warehouseman. But so long as a carrier has a further duty to perform, he is responsible for the safety of the goods: Story on Bailments, §§ 541, 542. *Stephenson v. Hart* (e) shews that the carrier's responsibility continues until the delivery is complete. *Ostrander v. Brown* (f) is an authority to the same effect. [Cockburn, C. J.—Assuming that the defendants, having a right to keep the parcel in respect of their lien but only in a convenient place, vexatiously sent it to London, would that amount to a conversion?] Since the Common Law Procedure Act, 1852, evidence that the defendant wrongfully deprived the plaintiff of the use and possession of his goods will support a count in trover. Any exercise of dominion over goods inconsistent with the owner's right amounts to a conversion: *Heald v. Carey* (g). The distinction between a mere asportavit and a wrongful conversion is pointed out in *Fouldes v. Willoughby* (h). The second replication to the third plea affords a complete answer to that plea, and if the defendants had any excuse for refusing to deliver the parcel that should have been pleaded by way of rejoinder: *Dixon v.*

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(a) Dig. Lib. 16, tit. 3, l. 12,  
 § 1; Pothier, *Traité de Dépôt*,  
 n. 56.

(b) 2 H. & N. 575.

(c) 8 B. & C. 528.

(d) 4 T. R. 581.

(e) 4 Bing. 476.

(f) 15 Johnson (New York),  
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(g) 11 C. B. 977.

(h) 8 M. & W. 540.

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*Clark (a).*—The Court intimated an opinion that it was not necessary to hear any argument on the point that a demand ought to have been made on the South Devon Company.

*Bovill*, in reply.—There is no authority for the proposition that the defendants were bound to keep the parcel at Plymouth. It is a mere technical rule which requires a person, who justifies the removal of goods encumbering his land, to allege that he removed them to a convenient distance. The duty of a carrier, qua carrier, terminates on the tender and refusal of the consignee to receive the goods at their place of destination; and if the carrier then retains the goods in respect of his lien, his only obligation is that of a warehouseman, or an involuntary bailee. A depositary has a right to change the place of deposit. The defendants held the goods for the consignor, who resided in London, and moreover the plaintiff's agent was told that they would be sent back to London. A person who is lawfully in possession of goods does not become liable in trover by merely changing their place of custody: *Simmons v. Lillystone (b)*, *Thorogood v. Robinson (c)*.

*Cur. adv. vult.*

WIGHTMAN, J.—Upon the facts of this case, as they appeared before us upon the argument, I entertain very great doubt whether the appellants were guilty of any neglect or breach of duty; but, however that may be, it seems to me that, as the case stands upon the pleadings, the issue upon the special replication to the third plea was properly found for the respondent (the plaintiff in the Court below.)

(a) 5 C. B. 365.

(b) 8 Exch. 431.

(c) 6 Q. B. 769.

The railway Company pleaded a tender of the goods to the plaintiff in the action on payment for the carriage, but that the plaintiff refused to pay the sum claimed for carriage, wherefore the Company refused to deliver the goods.

The plaintiff in the action replied that within a reasonable time after the Company had tendered the goods for delivery he offered at Plymouth to pay for the carriage of the goods, and requested them to deliver the goods, but the defendants refused to deliver them at Plymouth.

Upon this replication the Company took issue only, without any special rejoinder.

The jury found that the allegations in the replication were proved, as in fact they were, for the Company did refuse to deliver the goods at Plymouth though the carriage was tendered within a reasonable time; but the Company propose to excuse the refusal to deliver at Plymouth, on the ground that they had sent the goods back to London, which they contend they had a right to do. It appears to me that this ground of excuse should have been specially rejoined, and that the Company should have admitted a refusal to deliver at Plymouth, but excused it, supposing it to be an excuse, by alleging that, upon the original refusal of the plaintiff to pay the carriage for them, they had been returned to London; but that, upon a mere denial of the allegations in the replication, the Company could not avail themselves of the affirmative ground of excuse that they had sent them to London.

It seems to me that the real question between the parties would only arise upon a special rejoinder to the special replication to the third plea; but that, as the issues stand, the verdict for the plaintiff is right so far as the special count is concerned; and as to the count in trover I agree in opinion with my brother *Bramwell* in the Court below that the facts do not support the allegation of a conversion,

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and that the verdict upon "not guilty" to that count should be for the appellants.

CROMPTON, J.—I come to the same conclusion as my brother *Wightman*, that this judgment ought to be affirmed. I think we must look at the grounds of the rule *only*; because, under the statute which gives us jurisdiction, it is important that we should take care always to confine ourselves to the grounds stated in the rule. The statute has directed that the grounds shall be inserted in the rule, in order that when the case comes up to the Court of appeal, we should only decide on the matter of law which has been debated in the Court below. Now, the grounds stated in the rule are these.—“That the defendants having carried the parcel and tendered it at Plymouth to the plaintiff in due course, and the plaintiff having refused to pay the amount of the carriage, the defendants are not liable: and that there was no duty or obligation on the defendants to keep the parcel at Plymouth after the plaintiff’s refusal to pay the carriage.” I agree with what was said by my brother *Channell* in the Court below, that the question is as to the liability of the defendants, and on that question only the judgment depends. I think that we are entirely disembarassed from any question as to whether the defendants are liable in the capacity of carriers. It was argued that the defendants were not liable *qua* carriers, but in a different character. If that objection had been taken at the trial, the declaration would have been immediately amended, because it would only have been necessary to state, by way of inducement, that after the parcel had been tendered by the defendants the plaintiff demanded it and offered to pay the charge, and then aver that whilst it remained in the defendants’ hands they behaved with misconduct. Therefore I think that the majority of the Court below was perfectly right in treating

it as a mere question of liability, and that, under the circumstances, the finding of the jury was well warranted. It appears to me a most unjustifiable act, at once, and as must now be taken after the finding of the jury—in an unreasonable time, sending the goods to what must be taken, after the finding of the jury, to be an unreasonable place; for it was expressly found by the jury that it was an unreasonable time to send them to that place. Without going so far as to say that a carrier cannot under any circumstances, whether the place is very near or not, send back a parcel to the place where it was delivered by the consignor, it is certainly too much to say that the carrier may do so in every possible case. If such were the law a ship owner might, on the consignee not being ready to pay the freight at the port of discharge, at once send the goods back to Newcastle, New York, or any other port of shipment. It seems to me that, according to the general law, where a carrier undertakes to carry goods to a particular place, he must deposit them for a reasonable time, if the consignee is not ready to receive them. But, however that may be, I think that, under the circumstances, there was quite enough to warrant the jury in saying that the sending back the parcel to London was an unreasonable and wrongful act. I think that we have no right to disturb the verdict if we cannot entertain the objection upon the pleadings. In my opinion the verdict was not only well warranted, but I myself should have come to the same conclusion, that it was a perfectly wrongful act, under the circumstances, to send the goods back to the place and at the time the defendants did. For these reasons I am of opinion that the judgment ought to be affirmed; and I believe the Lord Chief Justice and my brothers *Williams* and *Willes* concur with me in this view of the case.

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WILLIAMS, J.—I certainly do concur in the judgment just pronounced by my brother *Crompton*. For my own part I have only to say I rest the opinion I have formed entirely on the finding of the jury, which I think conclusive as to the liability of the defendants.

CROWDER, J.—I have the misfortune to differ from the rest of the Court. I think that our judgment ought to be for the appellants.

A parcel having been delivered in London by the plaintiff to the defendants, to be carried to Plymouth and there delivered to Mr. Reynolds the plaintiff's agent, the defendants duly carried the same and duly offered it for delivery at Mr. Reynolds' place of business at two o'clock in the afternoon, demanding payment of 2s. 3d., the correct charge for the carriage, which was positively refused, whereupon the railway porter retained the parcel, saying that it would be returned to London; and at eight o'clock the following morning it was sent by the train to London. About two hours after its departure the parcel was demanded at the railway station at Plymouth on behalf of Mr. Reynolds and the 2s. 3d. tendered, when the clerk said that the parcel had that morning been returned to London. The case states that the parcel was in fact at the Paddington station, where it remained down to and at the time of the trial, and it does not appear that any other application for it was made to the defendants. On these facts the question is whether this action can be maintained.

The declaration contains two counts, the first charging the defendants with a breach of duty as carriers in not delivering the parcel; the second, in trover, for a conversion of it to their own use. I am of opinion that neither count can be sustained. The defendants, by their third

plea to the first count, excuse their non-delivery of the parcel by reason of Reynolds' refusal to pay for it when tendered. The plaintiff by his second replication to that plea avers a tender of payment and a demand of the parcel at Plymouth within a reasonable time after Reynolds' refusal; and avers that the defendants refused to deliver it to him at Plymouth. And the counsel for the plaintiff has argued that, taking the first count, the third plea to it and the second replication to the third plea together, the action is maintainable upon the ground that although the defendants' duty as carriers was partly performed, viz., to the extent of carrying to Plymouth and offering the parcel for delivery at Reynolds', yet that the defendants had failed to perform another portion of the duty which devolved upon them after the refusal by Reynolds to pay the carriage, viz., the keeping of the parcel a reasonable time at Plymouth; which reasonable time the jury have found had not elapsed prior to the demand and tender of payment by Reynolds at the Plymouth railway station. Now it appears to me that the defendants' duty as carriers terminated on the refusal by Reynolds to pay the carriage of the parcel when offered for delivery; such refusal being peremptory, without any request for delay or any intimation of a want of time for further consideration. Such refusal I think amounted to a positive and unqualified refusal to accept the delivery of the parcel. I agree in the opinion expressed by two of the learned Judges in the case cited of *Storr v. Crowley* (a), that the duty of the carrier terminates on such refusal; and I own it is quite new doctrine to me, and as I think wholly unsupported by authority, that after a peremptory refusal to receive the goods tendered by the carrier at their place of destination, he is bound by law to retain them there a reasonable time, in

(a) *McClell. & Y.* 129.

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order to allow an opportunity to the consignee to change his mind and do that which he ought to have done before, but which he had positively refused to do. It is true that a carrier has a right to detain the goods which he has carried by way of lien for the carriage, and that the exercise of that right imposes the duty of taking proper care of them for the owner: but the character of carrier has then terminated, and that of simple bailee has commenced, with very different duties and responsibilities attached to it. The defendants in this case, having a lien on the parcel, were bound to take proper care of it for the plaintiff who delivered it to them; but were under no legal obligation, I think, to keep it at Plymouth, or at any particular place. Assuming the object of the transport to have altogether failed by Reynolds' refusal to receive the parcel at Plymouth, the defendants might well have supposed that the plaintiff would demand restitution of it in London, where he had delivered it to them, and where, if he had sent to the Paddington station and discharged the defendants' lien, he would have had it re-delivered to him. Paddington was a convenient place for the defendants to keep the parcel, and might have been considered by them not inconvenient for the plaintiff; at all events I see no tortious act in the removal from Plymouth to London.

It seems to me therefore that neither as carriers nor as bailees did the defendants commit any breach of duty in removing the parcel to London as and when they did: then how can the count in trover be supported? There was no demand and refusal evidencing a conversion, nor did the defendants attempt to exercise any dominion over the parcel otherwise than by detaining it for their lien, as they lawfully might. The demand at Plymouth was after Reynolds had been informed that the parcel would be sent back to London; and having waited from two o'clock in the afternoon

of one day till ten o'clock in the morning of the next, he tendered payment and demanded the parcel, when he was informed, as the fact was, that it had been sent back to London. This was, I think, no evidence of conversion.

I am of opinion therefore that the action cannot be maintained, and that the verdict ought to be entered for the defendants.

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WILLES, J.—I concur in opinion with the majority of the Court, that the judgment ought to be affirmed.

The parcel which was delivered to the defendants to be carried to Plymouth was a packed parcel, that is, a parcel made up of several other parcels, and which the plaintiff sent to his agent at Plymouth to be distributed amongst his various customers there. That was known to the defendants, because they made an extra charge in respect of it being such a parcel. At the end of the line the charge was disputed, and thereupon the defendants sent back the parcel from Plymouth to London, where it had been delivered to them; thereby unquestionably making the carriage of the parcel entirely useless to the plaintiff, and rendering him responsible to the various persons from whom he had received the enclosed parcels; thus wantonly doing an act most injurious to the plaintiff. If it was not a breach of any legal duty, of course they were entitled to do so, notwithstanding the damage that it might produce to the plaintiff; but it appears to me that it was a breach of their legal duty. When the parcel was refused at Plymouth, the defendants were entitled to retain it in respect of their lien; or they might, if they chose, have delivered it, trusting to their action for the recovery of the proper sum for the carriage. They did not think proper to do the latter, but retained the parcel by way of lien; and retaining it, it

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appears to me, they were not entitled to dispose of it as they thought proper themselves. They could not have sent it to any foreign port: they could not have sent it to any distant part of the kingdom where it would be expensive and troublesome for the plaintiff to go to receive it. I think that those are indisputable propositions. If so, there must have been a duty imposed upon the defendants by law to take reasonable care of the parcel, and to deal with it in respect of time and place in a reasonable manner. That was the opinion of the Barons in *Hudson v. Baxendale* (a), and it appears to me to have been the true view of the case; and, generally speaking, dealing with a parcel under such circumstances in a reasonable manner will impose upon the carrier the duty of keeping it for a reasonable time, if he have the means of doing so, at the place to which it was originally consigned. I entirely agree in the remarks thrown out by my brother *Crompton* upon this point. The Court of Exchequer were right in discharging the rule, and the judgment ought to be affirmed.

Judgment affirmed.

(a) 2 H. & N. 575.

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## IN THE EXCHEQUER CHAMBER.

*(Appeal from the Court of Exchequer.)*

LEE v. COOKE.

Feb. 5.

**THIS** was an appeal against the decision of the Court of Exchequer, in refusing a rule to shew cause why the verdict should not be entered for the plaintiff, upon a point reserved at the trial. (The pleadings sufficiently appear in the report of the case, 2 H. & N. 584.)

The case stated on appeal was as follows:—

The plaintiff was tenant in possession of certain low lands under the jurisdiction of the defendant and other General Commissioners mentioned in the pleadings; and he had been duly charged with a rate amounting to 26*l.* 3*s.* 7*d.* under the Acts referred to. A dispute, however, arose between the plaintiff and the General Commissioners whether any legal demand of the rate had been made, and on the 30th November, 1855, a distress was made under the authority of the Commissioners for the amount, and a bean stack of the plaintiff, of more than sufficient value to satisfy the distress and expenses, was seized as a distress. The stack remained upon the plaintiff's premises, and on the 6th of December following it was sold under the distress, on the premises, by auction to John Leverton, for 29*l.* 3*s.* 6*d.*, under the following condition (amongst others.)

The defendants, Commissioners for draining certain lands, distrained a bean stack of the plaintiff for a rate due from him, and sold the stack by auction, one of the conditions of sale being that the purchaser was to take possession and pay for the same at the fall of the hammer. At the time of the sale the plaintiff said that "it would be one thing to buy the stack and another to take it away," and when the purchaser attempted to remove the stack from the plaintiff's premises, he was forcibly prevented by the plaintiff.

The purchaser did not pay for the stack, and the Commissioners levied a second distress for the same rate.—*Held*, in the Exchequer Chamber (affirming the decision of the Court of Exchequer), that as the plaintiff by his own misconduct had prevented the Commissioners from realizing the first distress, the second was not unlawful.

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—“The purchasers to remove their lots at their own expense, with all faults and errors of description (if any) ; to take possession of and to pay for the same at the fall of the hammer, (or, with the auctioneer's permission, at the close of the sale), the whole being sold for ready money.”

A memorandum, in writing, of the bargain was duly made and signed by the auctioneer in his book, within the provisions of the Statute of Frauds. On the sale to Leverton, the auctioneer (who was the bailiff) left the stack on the premises for Leverton to take away ; but he did not then take it away, or make any attempt so to do. On the Monday following (10th December), however, Leverton came to the plaintiff's premises with a cart to remove the bean stack, but the plaintiff assaulted and imprisoned him, destroyed his cart, and forcibly prevented him from removing the bean stack, and kept and converted the bean stack to his own use. Leverton did not pay for the stack, and the defendant and the other General Commissioners afterwards, on the 12th May, 1856, took a second distress for the same rates, by distraining the sheep mentioned in the declaration. At the time of the sale of the bean stack, the plaintiff was present, and said that “it would be one thing to buy the stack, and another to take it away.”

The learned Judge asked the jury the following question—“Do you think that Leverton had, at any time after the sale, an opportunity of taking the stack away ?” and the jury answered “No :” whereupon the learned Judge directed a verdict for the defendant, with leave for the plaintiff to move to enter a verdict for him for 34*l.* 2*s.* 6*d.* the price fetched by the sheep.

*Macaulay* (*Field* with him) now moved to enter the verdict for the plaintiff, pursuant to the leave reserved at the trial. —The second distress was illegal. Under the first distress,

a bean stack was sold for a sum sufficient to satisfy the rates ; and it was left for the purchaser to take away. As between the defendant and the plaintiff, that was a valid distress. The purchaser did not repudiate the contract. There was a bargain and sale by which the Commissioners parted with their lien, and the right of property was transferred to the purchaser. The illegal conduct of the plaintiff on the 10th of December did not divest the property from the purchaser ; and he might maintain trover against the plaintiff for the stack. By the conditions of sale, the purchaser was to take possession of and pay for the stack at the fall of the hammer. The true test is, whether there was such a delivery of the stack to the purchaser as would satisfy the Statute of Frauds. If the purchaser was sued for the price of the stack, it would be no answer that he tried to remove it, but was prevented by the illegal act of a third party. A person cannot distrain a second time for the same cause, where he has had an opportunity of realizing his claim under the first distress: *Dawson v. Cropp* (a), *Bagge*, Appt. *Mawby*, Resp. (b).

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COCKBURN, C. J.—We are all of opinion that the Court of Exchequer was right in refusing the rule. The second distress was occasioned by the plaintiff's misconduct. The Commissioners distrained upon him for rates. No doubt that distress was lawful ; and under the act of parliament they proceeded to sell by auction the stack which they had distrained. A person named Leverton purchased it. Whilst at the auction, the plaintiff used language equivalent to saying "you may buy but you never shall get possession;" and when Leverton attempted to obtain possession, the plaintiff, with the assistance of five or six men, committed

(a) 1 C. B. 961.

(b) 8 Exch. 641.

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unjustifiable violence and prevented Leverton from removing the stack. Leverton not being able to obtain possession, the Commissioners levied a second distress. The plaintiff now contends that inasmuch as they might have realized the amount of the rates under the first distress, the second is illegal. The whole question turns upon whether the first distress could have been carried out to its complete accomplishment. It is argued that while the stack stood on the ground of the plaintiff there was a constructive delivery to Leverton, and that the fact of possession being resisted with violence did not justify him in rescinding the contract, but that the remedy was by trover against the plaintiff. In my opinion that is not the correct view. I think that the right of the Commissioners was the same as if, having distrained, they had gone to take possession of the stack for the purpose of selling it, and the plaintiff had interposed with violence and prevented them from completing the distress. Under such circumstances they might have made a second distress. So here, the purchaser being prevented by the plaintiff from taking away the stack, the sale was frustrated and the distress was never perfected. The plaintiff by his conduct has brought upon himself the second distress.

WIGHTMAN, J.—I may add that the case of *Bagge v. Mawby* (a) is distinguishable, because there a third person threatened the landlord and thereby caused him to withdraw the distress. Here, if the purchaser had never made any attempt to get possession of the stack, the case would have been within the principle of the decision in *Bagge v. Mawby*. But not only could the purchaser not get possession, but the plaintiff deprived him of the means of getting possession, for he converted the stack to his own use. Mr.

(a) 8 Exch. 641.

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*Macaulay's* argument assumes that the purchaser got all that he was entitled to, so far as the vendors were concerned. It seems to me that they undertook that at least he should have an actual delivery. The purchaser could not get a delivery, though it was not merely his right but part of the bargain that there should be a delivery. It is said that he might maintain trover against the plaintiff for the stack, but that is a mere right, and he is not bound to pursue his remedy in that respect. The contract not having been performed on the part of the vendors by reason of the misconduct of the plaintiff, he cannot maintain this action.

WILLIAMS, J.—It appears that the plaintiff's own misconduct rendered the first distress unavailing, and therefore he cannot complain of the second distress.

CROMPTON, J.—I am of the same opinion. The rule of law is, and very properly, that a person cannot distrain a second time for the same cause, if he has had an opportunity of making available the first distress. On the other hand if, by the unlawful act of the distrainee, the distrainor is prevented from realizing the distress, he may distrain again. Here, the plaintiff by his unlawful conduct prevented the first distress from being available, and therefore he cannot complain of the second.

CROWDER, J.—The first distress proved abortive in consequence of the wrongful act of the plaintiff, and therefore by the rule of law he cannot complain of the second distress. It is said there was a complete sale of the stack to Leverton, and that the act of the plaintiff could not defeat its effect and prevent the property from vesting in him. It seems to me that there was not a complete sale. Under one of the conditions the purchaser was to take possession when pay-



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ment was made. That assumes that there was to be a delivery of the stack; and a delivery must mean that the party to whom it was sold has power to carry it way. From the beginning, the plaintiff threatened that the purchaser should never have the stack, and when he came to take it away the plaintiff prevented him with violence. Therefore he never had an opportunity of taking possession of the stack, and the first distress was rendered fruitless by the wrongful act of the plaintiff.

*Mellor and Hayes, Serjt., appeared to shew cause.*

*Rule refused.*

### IN THE EXCHEQUER CHAMBER.

*(Error from the Court of Exchequer.)*

Feb. 4.

RUCK and Others v. THE ATTORNEY GENERAL.

An information under the Customs Acts, charged, in the first three counts, four defendants with several offences on several days; in the fourth, fifth, sixth and seventh counts, it charged four of those defendants, together with four others, with similar offences on other days. A

verdict having been found for the Crown against different defendants on different counts, the Attorney General entered a nolle prosequi as to all the counts except the fourth, upon which six of the defendants were convicted and two acquitted; and judgment was entered up for the penalty and costs against each defendant accordingly. A writ of error having been brought:—*Held*, that the judgment was not erroneous.

IN this case, reported 11 Exch. 763, and in which the information was filed after the passing of 16 & 17 Vict. c. 107, a stet processus was entered by the Attorney General as to Joseph Hobbs the younger, and a nolle prosequi as to all the counts except the fourth. Upon the fourth count judgment was entered up against Robert Ruck, Henry Beal, Joseph Hobbs the elder, James Hobbs, Joseph Beal, and William Fairbrass, severally, for the penalty and costs against each. Joseph Ledger and Edward Clarkson were acquitted. A writ of error having been brought upon this judgment,

*Honyman* now argued for the plaintiffs in error.—The judgment ought to be arrested. There is a misjoinder of counts and a misjoinder of defendants. [*Willes*, J.—Surely that is merely ground for an application to try the cases separately. *Coleridge*, J.—Are you not in error in contending that the joining several defendants in one indictment is a ground of error? The grand jury may if they please join several defendants charged with offences of the same nature in one bill (a).] In *Rex v. Philips* (b) six persons were included in one indictment for perjury, and four of them who pleaded having been convicted, the judgment was arrested. [*Willes*, J.—There the offences were in their nature several.] The Court in that case observed that there would be great inconvenience if the defendants could be indicted jointly; one might be desirous of having a certiorari and the other not; and the jury on the trial might apply to all what was only evidence against one. *Rex v. Gregory* (c) shews that the Court will not quash an information filed by the Attorney General on motion; therefore, if error will not lie, the defendants, though exposed to the suggested inconvenience, may be without remedy. An information for penalties is a civil proceeding; it is “the King’s action of debt:” *Cawthorne v. Campbell* (d), *Attorney General v. Freer* (e). There is no authority that such misjoinder can be cured by the entry of a nolle prosequi after the trial. One defendant cannot be found guilty if others are acquitted. [*Wightman*, J.—The question as to that point is, whether the proceeding is founded upon contract or tort.] The 8 & 9 Vict. c. 87, s. 104, contains no provision with reference to the acquittal

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- (a) See 1 Starkie’s Criminal Pleading, p. 43, citing *Rex v. Kingston*, 8 East, 41, 46; *Young v. The King*, 3 T. R. 98. See also *Rex v. Austin*, 7 C. & P. 796; *Rex v. Galloway*, 1 Moo. C. C. 234; *Regina v. Caspar*, 2 Moo. C. C. 101.
- (b) 2 Stra. 920.
- (c) 1 Salk. 372.
- (d) 1 Anst. 205 n., 214.
- (e) 11 Price, 183; Per Gram, B., 187.

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of one defendant. The offence was not an offence against the 16 & 17 Vict. c. 107. [*The Solicitor General* referred to s. 267. *Coleridge, J.*—The Act does not apply to any particular offences but to all procedure, whether the offence was committed before or after the Act.] The 267th section is a legislative recognition that but for the passing of that Act the acquittal of one defendant would be fatal. [*Willes, J.*—There is not much weight in that argument. The 18 & 19 Vict. c. 91, s. 21, professes to give a jurisdiction which existed before.]

*The Solicitor General, Wilde and Cleasby*, who appeared for the Crown, were not called upon.

Per CURIAM (a).—We are all of opinion that the judgment must be affirmed.

Judgment affirmed.

(a) *Cockburn, C. J., Coleridge, Williams, J., Crompton, J., Crowder, J., Wightman, J., Erle, J., Wilde, J., and Willes, J.*

## MEMORANDA.

In Hilary Vacation (Feb. 26) Lord Cranworth resigned the Great Seal, and it was delivered to Sir *Frederick Thesiger*, Knt., one of her Majesty's Counsel, who was afterwards raised to the peerage by the title of Lord Chelmsford, of Chelmsford, in the county of Essex.

Sir *Richard Bethell*, Knt., resigned his office of her Majesty's Attorney General, and was succeeded by Sir *Fitzroy Kelly*, Knt. Sir *Henry Singer Keating*, Knt., resigned his office of Solicitor General, and was succeeded by *Hugh M'Calmont Cairns*, Esq., one of her Majesty's Counsel, who afterwards received the honour of Knighthood.

## Exchequer Reports.

EASTER TERM, 21 VICT.

GEORGE FRANKLIN, Administrator of THOMAS FRANKLIN,  
deceased, v. THE SOUTH EASTERN RAILWAY COMPANY.

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May 7.

**DECLARATION**, on the 9 & 10 Vict. c. 93, s. 2, by the plaintiff, as administrator of Thomas Franklin, against The South Eastern Railway Company, for negligence in carrying the said Thomas Franklin, a passenger by the railway, whereby he was killed.—Plea: Not guilty.

At the trial before *Bramwell*, B., at the London sittings after last Michaelmas Term, the following facts appeared:—The plaintiff was a light porter at St. Thomas's Hospital, which situation he had held for thirty-two years. The deceased, who was twenty-one years of age, was the son of the plaintiff and was porter to a saddler at the wages of 23s. per week. On the 28th June, 1857, the deceased was a passenger on the defendants' railway from Gravesend to London, when a collision took place through the negligence of the

In an action on the 9 & 10 Vict. c. 93, for injury resulting from death, the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life.

In an action by a father for injury resulting from the death of his son, it appeared that the father was old and infirm, that the son, who was young

and earning good wages, assisted his father in some work for which the father was paid 3s. 6d. a week. The jury having found that the father had a reasonable expectation of benefit from the continuance of his son's life:—*Held*, that the action was maintainable.

4 C.B. N.S. 296  
4 H & N 653

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defendants' servants and he was killed. The plaintiff was in the habit of carrying up coals to the wards of the hospital for which he was paid 3s. 6d. a week, but in consequence of illness the deceased had for some time past carried up the coals for him.

The defendants' counsel submitted that the plaintiff had sustained no damage by the death of the deceased which entitled him to maintain the action. The learned Judge left it to the jury to say whether the plaintiff had a reasonable expectation of any and what pecuniary benefit from the continuance of his son's life. The jury found a verdict for the plaintiff for 75*l.*, and leave was reserved to the defendants to move to enter a nonsuit, if the Court should be of opinion that the action was not maintainable.

A rule nisi having been obtained accordingly,

*Francis* shewed cause (April 22).—The 9 & 10 Vict. c. 93, s. 1, enacts, "That whosoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured." By section 2: "Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused," &c.; "and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought," &c. The plaintiff has sustained a damage by the death of his son, which entitles him to maintain the action. The case of *Blake v. The Midland*

*Railway Company* (a) established this principle, that the jury, in estimating the damage, cannot take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only. Here the plaintiff, who was old and infirm, had received assistance from his son to the extent of 3s. 6d. a week; and the jury found that he had a reasonable expectation of pecuniary benefit from the continuance of his son's life.

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*Edwin James* and *Petersdorff*, in support of the rule.—The plaintiff has sustained no damage which entitles him to maintain the action. He was under no contract to carry the coals, and his employment in that respect was eleemosynary only. The assistance of his son was a mere act of kindness, which might have been discontinued at any time. It resembles that of a present made by one member of a family to another. An action of this kind must be based on some pecuniary loss capable of calculation. The statute requires the jury to assess the damages with reference to the injury resulting from the death. [*Bramwell*, B., referred to Burn's Justice, tit. "Poor," s. 13, p. 98, ed. 29.]

*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—In this case the plaintiff, as administrator of his son, sued (under the statute 9 & 10 Vict. c. 93) the defendants, by the negligence of whose servants his son's death was caused; and the question was if he was entitled to maintain the action, it being contended that it was necessary the plaintiff should shew a damage, and that he had shewn none.

The statute does not in terms say on what principle the

(a) 18 Q. B. 98.

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action it gives is to be maintainable, nor on what principle the damages are to be assessed; and the only way to ascertain what it does, is to shew what it does not, mean. Now it is clear that damage must be shewn, for the jury are to "give such damages as they think proportioned to the injury." It has been held that these damages are not to be given as a solatium; but are to be given in reference to a pecuniary loss. That was so decided for the first time in banc, in *Blake v. The Midland Railway Company* (a). That case was tried before *Parke, B.*, who told the jury that the Lord Chief Baron had frequently ruled at *Nisi prius*, and without objection, that the claim for damage must be founded on pecuniary loss, actual or expected, and that mere injury to feelings could not be considered. It is also clear that the damages are not to be given merely in reference to the loss of a legal right, for they are to be distributed among relations only, and not to all individuals sustaining such a loss; and accordingly the practice has not been to ascertain what benefit could have been enforced by the claimants, had the deceased lived, and give damages limited thereby. If then the damages are not to be calculated on either of these principles, nothing remains except they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. Whether the plaintiff had any such reasonable expectation of benefit from the continuance of his son's life, and if so, to what extent, were the questions left in this case to the jury. The proper question then was left, if there was any evidence in support of the affirmative of it. We think there was. The plaintiff was old and getting infirm; the son was young, earning good wages and apparently well disposed to assist his father, and in fact he had so assisted him to the value of 3*s.* 6*d.* a week. We do not say that it was neces-

(a) 18 Q. B. 93.

sary that actual benefit should have been derived, a reasonable expectation is enough, and such reasonable expectation might well exist, though from the father not being in need, the son had never done anything for him. On the other hand a jury certainly ought not to make a guess in the matter, but ought to be satisfied that there has been a loss of sensible and appreciable pecuniary benefit, which might have been reasonably expected from the continuance of the life.

We think therefore the action maintainable. But as on any view the damages were excessive, there must be a new trial unless the parties can agree to abate them.

Rule accordingly.

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ISAAC MORGAN v. NICHOLL.

May 7.

**GRAY**, for the defendant, moved for a rule to stay proceedings in this action of ejectment till the costs of a former action, *Jacob Morgan v. Nicholl*, had been paid.

It appeared from the affidavits, that the action of *Jacob Morgan v. Nicholl*, which was brought to recover possession of an estate called Pantygoitre, in the county of Monmouth, was tried at the Spring Assizes 1857, when a verdict was found for the defendant, and the costs were taxed at 693*l*. Jacob Morgan claimed as the heir of his father Isaac Morgan, the plaintiff in this action, who, it was alleged, was the heir of one John Morgan, and on the trial Jacob Morgan produced a witness to prove that his father was dead. Isaac Morgan, who had not been heard of previously

An action of ejectment having been brought by a son claiming as heir through his father, who was alleged to be dead, and a verdict having passed for the defendant, the father, who was shewn to have been aware of the former action, but to have kept out of the way to prevent his son from being non-suited, brought a second action

to recover the same premises. The Court stayed the proceedings till the costs of the former action were paid.



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for several years, was however in the neighbourhood of Monmouth at the time of the former trial, and was aware of the action having been brought. The defendant swore that he believed, that the reason why Isaac Morgan then kept out of the way and did not come forward to support his own claim was, that if he had appeared Jacob Morgan would have been nonsuited. Isaac Morgan had expressed to several persons his dissatisfaction at the result of the former trial, and his intention "to have a new trial with Mr. Nicholl." The present action was brought to recover the same property, and in the same right as in the former action

*Gray*, in support of the application.—The plaintiff seeks to try the same title as that tried in the former case. The rule is laid down, that the Court will stay proceedings in a second ejectment till the costs are paid of a prior one for the trial of the same title; and it matters not that the second ejectment be brought by "a third person under whom the lessor of the plaintiff claims (*a*), or for the same or different premises, so as it be on the same title and for part of the same estate": *Tidd's Practice*, p. 1232, 9th ed. *Doe d. Brayne v. Bather* (*b*) is also an authority, that if the second ejectment is to try the same title, it matters not that the parties are different,

*Petersdorff* shewed cause in the first instance.—To entitle the defendant to a stay of proceedings, it should be shewn that the plaintiff in the second action claims through or under the plaintiff in the former action.—He referred to 17 & 18 Vict. c. 185, s. 93.

Per CURIAM.—The rule must be absolute.

Rule absolute.

(*a*) Quære, "claimed."

(*b*) 12 Q. B. 941.

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BIGNELL v. BUZZARD.

April 29.

**DECLARATION.**—That before and at the time of the committing of the grievances, &c., the plaintiff was the proprietor and was lawfully possessed of a certain building and rooms, called the Argyll Rooms, adapted for a dancing academy, a subscription ball room, or concert room: Yet the defendant well knowing the premises, but contriving to injure the plaintiff, falsely and maliciously composed, printed and published, in divers printed placards and advertisements, and in divers public newspapers, of the plaintiff and of the said building and rooms, and of the plaintiff as the proprietor thereof, the words following, that is to say:—

“ St. James, Westminster.

“ Argyll Rooms, Great Windmill Street” (meaning the said building and rooms).

“ Notice is hereby given, that the magistrates of the county of Middlesex in Quarter Sessions assembled, having this day refused to renew a music and dancing license to the proprietor of the above rooms, all such entertainments there carried on, whether advertised under the name of an academy, subscription ball, concert or otherwise, are illegal; that the proprietor (meaning the plaintiff) renders himself thereby indictable for keeping a disorderly house; and that every person who shall be found upon the premises (meaning in the said building and rooms) is liable to be apprehended and dealt with according to law.

“ By order.

GEORGE BUZZARD, Vestry Clerk.”

By means of which premises the plaintiff was prevented from using and letting the said building or rooms as a dancing academy, or as a subscription ball room, or as a concert room, or for any other purposes, which he might

The declaration alleged that, the plaintiff being the proprietor of certain rooms adapted for a dancing academy, the defendant falsely and maliciously published of the building and rooms, and of the plaintiff as proprietor thereof, that “ the magistrates in quarter sessions having refused to renew a music and dancing licence to the proprietor, all such entertainments there carried on are illegal, and the proprietor renders himself thereby indictable for keeping a disorderly house, and every person found on the premises will be apprehended and dealt with according to law,” by means of which premises the plaintiff was prevented from letting the rooms.—*Held*, on demurrer, that the declaration was good.

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and otherwise could and would have done for profit and reward to him the plaintiff in that behalf; and the said building and rooms became and were wholly useless and unproductive to the plaintiff, and the plaintiff was and is otherwise injured, &c.

Demurrer to so much of the declaration as alleges grievances in respect of the building and premises, and of the plaintiff as the proprietor thereof.—Joinder in demurrer.

*Keane* argued for the defendant (*a*).—The declaration is bad, for not averring that the plaintiff had ever carried on business in these rooms, or that they had been kept for public dancing, music or other public entertainments of the like kind, so as to be affected by the provisions of 25 Geo. 3, c. 36, s. 2. If that had appeared, it might have been a libel if the defendant had published that the magistrates had refused a license, when in fact they had not done so. [*Pollock*, C. B.—There is no inuendo that the plaintiff had been guilty of any improper conduct.] The question is, whether the publication is calculated to bring the plaintiff into contempt and disgrace with his fellow citizens. [*Bramwell*, B.—It is not an imputation on the plaintiff's conduct, nor does it affect his property, unless it is shewn to render it less fit for some purpose or other.]

*Lush*, for the plaintiff.—Every word of the libel must be taken to be malicious and untrue. It assumes that the plaintiff was the proprietor of a building in which entertainments were carried on. The defendant says all such entertainments are illegal. No inuendo is necessary, the sense of the words being clear. [*Channell*, B.—An inuendo is necessary where the words may mean one thing or another.] The question is, are the words defamatory of

(*a*) April 21. Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Channell*, B.

the individual of whom they were written? If the plaintiff had a music license for the rooms, it is clear that these words would have a tendency to injure him. [*Pollock*, C. B.—There should have been an inuendo: *Capel v. Jones* (a). The declaration charges that which may be consistent with perfect honour on the part of the plaintiff. *Channell*, B.—The 61st section of the Common Law Procedure Act, 1852, does not appear to have done away with the necessity of an inuendo. It cannot be contended that the declaration is good as alleging to slander of title.] It must be admitted that there is no sufficient allegation that the plaintiff carried on business in the rooms. But suppose the license had not in fact been refused, to say that it had been would surely be libellous. The statement would imply that the house had been improperly managed. A specific grievance or loss is alleged: it is averred that the plaintiff was prevented from letting the rooms. [*Channell*, B.—In slander the plaintiff may rely on proof of special damage. In libel special damage has no existence as a ground of action (b). This is an intermediate case, it is not slander of title: but may there not be a case of libel of title?]

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*Keane*, in reply.—*Tindal*, C. J., in delivering the judgment of the Court in *Malachy v. Soper* (c), says: "An action for slander of title is not properly an action for words spoken, or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title." Here there is no sufficient averment of special damage. [*Martin*, B.—Suppose no one would hire the rooms, how could the damage be alleged otherwise than in the present case?]

*Cur. adv. vult.*

(a) 4 C. B. 259. See also and Libel, 148—169.  
*Robinson v. Jermyn*, 1 Price, 11. (c) 3 Bing. N. C. 371, 383.  
(b) See *Starkie* on Slander

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POLLOCK, C. B., now said.—We are of opinion that in this case there must be judgment for the plaintiff, though not without some doubt in the mind of more than one member of the Court. Very little need be said as to the ground of our judgment, and I will only observe that the doubt has arisen from the matter being so near the point of difference, where it ceases to be justifiable and libel commences.

Judgment for the plaintiff.



NEWTON v. BECK, Public Officer of THE NORTH AND  
SOUTH WALES BANKING COMPANY.

April 17.

L. conveyed to the plaintiff by way of mortgage certain land and deposited with him an indenture conveying the land from G. to T., and also a document purporting to be an indenture by which the land was conveyed by I. to L. This document was in fact a forgery. L. afterwards deposited with the defendants, by way of equitable mortgage, a document purporting to be the conveyance from G. to T., but which was in fact a forgery, and also the genuine indenture of conveyance from T. to L.—*Held*, that the plaintiff might maintain *detinue* against the defendant for the recovery of the latter indenture.

**D**ETINUE for an indenture of the plaintiff, bearing date the 28th December, 1855, and expressed to be made between J. Tunstall of the one part, and H. Lewison of the other part.

Pleas (*inter alia*).—That the plaintiff was not possessed as alleged.

At the trial before *Byles, J.*, at the last Liverpool Assizes, it appeared that in January, 1856, one H. Lewison conveyed to the plaintiff and his assigns in fee simple by way of mortgage some land at Shordley, in the county of Flint, which he had purchased of one Tunstall. On the execution of the mortgage, Lewison deposited with the plaintiff an indenture of the 23rd February, 1848, made between Sir S. Glynne of the one part, and J. Tunstall of the other part, being a conveyance to Tunstall of the land in Shordley; and also

the genuine indenture of conveyance from T. to L.—*Held*, that the plaintiff might maintain *detinue* against the defendant for the recovery of the latter indenture.

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a document which purported to be an indenture of the 7th January, 1856, by which the same land was conveyed by Tunstall to Lewison. This document was supposed by the plaintiff to be a genuine indenture, but was in fact a forgery. The mortgage deed contained a covenant by Lewison to deliver to the plaintiff all deeds and securities in Lewison's possession relating to the mortgaged land. In the May following, Lewison, who had an account with the North and South Wales Bank, applied to the manager of the bank for liberty to overdraw his account. The manager required security, upon which Lewison deposited with the bank, by way of equitable mortgage, certain documents mentioned in a schedule to the memorandum of deposit. Amongst these documents was one purporting to be the above mentioned indenture of the 23rd February, 1848, but which was in fact a forgery, and also the genuine indenture of conveyance from Tunstall to Lewison of the land at Shorley, dated the 28th December, 1855, and for the recovery of which this action was brought. Lewison afterwards absconded, and the plaintiff demanded the deed of the bank, but they refused to deliver it up.

The learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him.

*Atherton* now moved accordingly.—The bank are entitled to retain the deed. It was deposited with them as a security for a loan, and without notice of the previous incumbrance; therefore they are innocent holders for value. The covenant in the mortgage deed refers to the instruments delivered up at the time of the mortgage. *Wiseman v. Westland* (a) decided that a mortgagee by demise for a term of years is not entitled to the purchase deed conveying the freehold to

(a) 1 Y. & J. 117.

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the mortgagor, as against a person with whom the latter has deposited it as security for a loan, and without notice of the previous mortgage. The only distinction between that case and the present is, that there the first mortgage was for a term of years.

MARTIN, B.—The learned Judge was correct in his ruling. The operation of the mortgage was to give the plaintiff a property in all the deeds, relating to the mortgaged land. Although he was in error in supposing that the real deed was delivered to him, that did not prevent it from being his property, and consequently he is entitled to maintain an action of detinue or trover in respect of it.

BRAMWELL, B., and CHANNELL, B., concurred.

Rule refused.

April 30.

SMITH and Others v. JOHNSON.

A declaration on a bill of exchange against the acceptor, alleged an indorsement by the drawer to the H. Company and by the Company to the plaintiff. Plea traversing the indorse-

**DECLARATION.**—That Taylor and Bright, on the 23rd June, 1857, by their bill of exchange now overdue directed to the defendant, required the defendant to pay to their order 453*l.*, three months after date, and the defendant accepted the bill: that Taylor and Bright indorsed the same to the Hull Flax and Cotton Mill Company, and the Company indorsed the same to the plaintiffs.

It was proved that the bill had been indorsed in blank by the drawers, and afterwards delivered by them to the Company. It was indorsed by two directors, "per proc. of the Company," to the plaintiff. By the deed of settlement and resolutions which were duly registered, the directors had no power to indorse the bill.—*Held* that, whether or not the Company was bound, the indorsement being sufficient to transfer the property and right of suit on the bill, the allegation in the declaration was proved.

*Quere*, whether the rule, that a person taking a bill indorsed "per procuration" is bound to take notice of the extent of the authority of the person indorsing, applies to the case of a partner indorsing "per procuration."

Plea (inter alia).—That the Hull Flax and Cotton Mill Company did not indorse the said bill.—Issue thereon.

At the trial, before *Bramoell*, B., at the London Sittings in last Hilary Term, the following facts appeared.—The bill in question was indorsed by Taylor and Bright, the drawers, in blank, and it was also indorsed as follows:—"p. p. Hull Flax and Cotton Mill Company, J. Bright, T. Whitaker, Directors." The plaintiffs, who were the bankers with whom both Taylor and Bright and The Hull Flax and Cotton Mill Company kept accounts, had given value for the bill which they received from the cashier of the Company of which Bright was chairman and Whitaker deputy-chairman. The Company was registered in August 1856, under the 19 & 20 Vict. c. 47.—It appeared from the deed of settlement and certain resolutions which also had been registered, that Bright and Whitaker had no power to indorse this bill on behalf of the Company.

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Upon these facts the learned Judge directed a verdict for the defendant, reserving leave to the plaintiffs to move to enter a verdict for them: the declaration to be amended by striking out the allegation of an indorsement by the Hull Flax and Cotton Mill Company, if necessary.

*Edward James* having obtained a rule nisi accordingly,

*Lush* and *C. G. Merewether* now shewed cause.—This bill being indorsed "per procuration," the plaintiffs, who were the bankers of the Company, took it with notice that they must inquire whether the persons so indorsing it had authority to bind the Company: *Attwood v. Munnings* (a). The plaintiffs, not being holders in their own right, are not entitled to maintain this action: *Fraser v. Welch* (b). [*Channell*, B.—Should not the defendant have pleaded

(a) 7 B. & C. 278. On this point they referred also to *Ernest v. Nicholls*, 6 H. L. 401; *MacLae* v. *Sutherland*, 3 E. & B. 1.  
(b) 8 M. & W. 629.



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that some other person had a title to the bill?] The property in the bill is in the Hull Flax and Cotton Mill Company. The defendant could have no defence to an action by them, because, under the circumstances, the plaintiffs were possessed of the bill as trustees for that Company. In *Stones v. Butt* (a), when the defendant was arrested the plaintiff was not possessed of the bill of exchange sued upon: it was in the possession of persons to whom the plaintiff was indebted, to whom he had indorsed it over, and who were ready to give it up to the plaintiff for the purpose of the suit; and it was held that the defendant was not entitled to be discharged out of custody. [*Pollock*, C. B.—That case is not satisfactory, but it involves no principle: it amounts to no more than this, that as a matter of practice the Court refused to interfere. *Martin*, B.—If the defendant pays the bill, he will get it. The Company cannot recover unless they get the bill into their possession. *Bramwell*, B.—If A., B. and C. are holders of a bill and A. indorses it, B. and C. could not deny the indorsement: *Jones v. Yates* (b), *Brandon v. Scott* (c). Could a third person do so?]

The Court offered to permit *Edward James* to amend by striking out the allegation of the indorsement by the Company, but he refused to do so.

*Edward James* (with whom was *W. S. Cross*), in support of the rule.—Any partner in this Company could indorse bills in the name of the Company, so as to bind the rest. A trading company cannot, by private agreement, prejudice the rights of third parties. The bills in question were indorsed in the name of the firm by two directors who were partners. Third persons are not bound to inquire as to the authority

(a) 2 C. & M. 416.

(b) 9 B. & C. 532.

(c) 7 E. & B. 234.

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of a *partner* to indorse bills. The cases as to *procuration* only apply where bills are indorsed or accepted by an agent: *Withington v. Herring* (a), *Attwood v. Munnings* (b). [*Bramwell*, B.—If a partner signs the name of the firm, the partnership is bound, but if he signs “per proc,” does he not give notice that he is acting, not under his general, but by virtue of some special authority?] The doctrine laid down in *Alexander v. Mackenzie* (c) and *Fearn v. Filica* (d) might apply to the cases of partners if it were shewn that a party who took the bill had notice of an agreement between the partners in contravention of which the bill had been indorsed. But *Forbes v. Marshall* (e) shews that the indorsement would have bound the Company even if it had been prohibited by the deed of settlement; and *Hallett v. Dowdall* (f) is to the same effect. [*Bramwell*, B.—In what sense must the word “indorsed” be understood?] Even if it is doubtful whether the Hull Flax and Cotton Mill Company is bound, it may well be that the indorsement is sufficient to transfer the property and right of suit upon the bill.—They referred also to *Smith v. The Hull Glass Company* (g).

POLLOCK, C. B.—I am of opinion that this rule must be absolute. The facts proved shew that the plaintiffs are entitled to sue. There is here such an indorsement as ordinarily transfers the property in a bill. I do not participate in the doubt expressed by my brother *Bramwell* as to the effect of an indorsement “per procuration” in a case like the present. If that has any legal foundation, my brother *Bramwell* has suggested the solution of the difficulty.

(a) 5 Bing. 442.

(b) 7 B. & C. 278.

(c) 6 C. B. 766.

(d) 7 Man. & G. 513.

(e) 11 Exch. 166. Per *Martin*, B.,  
 178, 179.

(f) 18 Q. B. 2.

(g) 11 C. B. 897.

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BRAMWELL, B.—I also think that this rule must be absolute. I doubt if this indorsement is sufficient to bind the Hull Flax Company. I decide the case on another ground. The declaration alleges an indorsement to the Hull Flax Company, and by the Hull Flax Company to the plaintiffs. Does that mean that the indorsement enabled the plaintiffs to sue the Hull Flax Company, or merely that it transferred the title to the bill? I doubt as to the former, but not as to the latter point. The directors put their names to the bill, and that is a transfer of the property and a sufficient indorsement if the word “indorsed” is to be understood in the limited sense, and that it must be so is proved almost to demonstration. The plaintiffs do not hold the bill as trustees; and if we held that the defendant was not liable, he would be liable to nobody. It seems to me that the effect of the indorsement was to transfer the bill to the plaintiffs, and that they can sue the acceptor even if they can maintain no action against the Hull Flax Company.

CHANNELL, B.—I concur in the reasons given by my brother *Bramwell*. This action is brought by the indorsees against the acceptor of a bill indorsed generally by the drawer; and the question is, whether there is any difficulty because the indorsees have alleged an indorsement by the Hull Flax Company. If, in order to prove that allegation it were necessary to shew that the Company are liable upon the bill, I should require further time to consider that point. But in fact it only means that the bill and the right of suit upon it were transferred. The allegation is proved if it is shewn that the Hull Flax Company were not entitled to the possession of the bill.

Rule absolute.

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## IN RE CHARLES SMITH.

April 15.

**I**N this case a writ of habeas corpus had issued, directed to the keeper of the House of Correction for the borough of Kingston-upon-Hull, commanding him to bring up the body of Charles Smith detained in his custody.

The keeper of the House of Correction made the following return :—

On the 30th of March, 1858, Charles Smith was committed to my custody by virtue of a certain warrant of commitment, &c.—The return then set out the warrant, which was under the hand and seal of T. Trail, Esq., a stipendiary police magistrate for the borough of Kingston-upon-Hull, and was addressed to the keeper of the House of Correction in that borough, and (so far as material) was as follows:—Whereas Charles Smith, late of the borough of Kingston-upon-Hull, shipwright, was on &c. duly convicted before me the undersigned stipendiary police magistrate in and for the said borough: For that he the said Charles Smith did, on the 23rd day of March, A. D. 1858,

A writ of habeas corpus having issued directed to the keeper of a House of Correction in the borough of Kingston-upon-Hull to bring up S., a prisoner detained in his custody, the keeper made a return setting out a warrant of commitment by a magistrate of the borough, stating that S. did unlawfully aid and abet T., a handicraftsman, who had contracted in writing to serve H., a shipbuilder, in neglecting and refusing to commence his service

with H. according to his contract. The return then stated that whilst S. was in the keeper's custody, the same magistrate delivered to him another warrant of commitment which stated that S. was duly convicted: "for that T., a handicraftsman, did on &c., at the parish of Holy Trinity in the borough aforesaid, contract with H., a shipbuilder, to serve him in the capacity of a shipwright for a period not then expired, the said contract being in writing and signed by the contracting parties; and that T. did not then and there, or at any day since then, enter into his service according to his contract, and that he had not the consent of H. nor any lawful excuse for such his default in not entering into his service: and that S. before the committing of the offence by T. unlawfully did aid, abet, counsel, and procure T. the said offence in manner and form aforesaid to commit, that is to say, S. did then and there aid, abet, counsel, and procure T. so as aforesaid not to enter his service according to the said contract:" and it was thereby adjudged that S. for his said offence should be imprisoned in the House of Correction in the said borough, &c.—The first warrant of commitment was had on the face of it.

*Held:* First, that the defect in the first warrant was cured by the second, it appearing by the return that the second was substituted by the same magistrate as an amendment of the first.

Secondly, that the second warrant sufficiently stated that S. aided T., "knowing that he had not the consent of H. or any lawful excuse for not entering into his service."

Thirdly, that the warrant was not bad, because it stated that S. "did aid, abet, counsel, and procure," without stating of which offence he was convicted.

Fourthly, that an affidavit could not be received for the purpose of shewing that T. did not in fact contract within the borough, as stated in the warrant.

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at the said borough, unlawfully aid and abet one George Thompson, a certain handicraftsman, who before that time had entered into a contract in writing to serve one James Hallett, a certain shipbuilder, for a period not then expired, in neglecting and refusing to commence his service with the said James Hallett, according to the said contract, contrary to the form of the statute, &c.; and that it was thereby adjudged that the said Charles Smith for his said offence should be imprisoned in the House of Correction in the said borough, and there kept to hard labour for the space of twenty-one days: These are therefore to command you, &c., to receive the said Charles Smith into your custody, &c.

The return then proceeded as follows.—And afterwards, and whilst the said Charles Smith was so in my custody as aforesaid, that is to say, on the 12th day of April, A. D. 1858, before the coming to me of the said writ, T. Trail, Esq., her Majesty's stipendiary police magistrate in and for the borough of Kingston-upon-Hull aforesaid, the police magistrate in the warrant of committal herein above set forth named, caused to be delivered to me a certain other warrant of commitment, the tenor of which is as follows:—

Borough of Kingston-upon-Hull.—To all and singular the constables of the said borough, and to the keeper of the House of Correction, &c.: Whereas Charles Smith, of the borough of Kingston-upon-Hull, shipwright, was at the borough of Kingston-upon-Hull on this day duly convicted before me the undersigned her Majesty's stipendiary police magistrate in and for the said borough: For that one George Thompson, a certain handicraftsman, did on the 20th day of March instant, at the parish of Holy Trinity in the borough aforesaid, contract with one James Hallett, a shipbuilder, to serve him in the employment or capacity of a handicraftsman, that is to say a shipwright, from the

22nd day of the said month of March for a certain period not then nor yet expired, the said contract then and there being in writing, and signed by the said George Thompson and James Hallett the said contracting parties; and that the said George Thompson did not then and there, or at any day since then, enter into or commence his said service according to his said contract; and that the said George Thompson had not the consent of the said James Hallett, and had not any lawful excuse for such his default in not entering into and not commencing his said service as aforesaid, contrary to the form of the statute, &c. : And that the said Charles Smith, before the committing of the said offence by the said George Thompson as aforesaid, to wit, at the said parish of Holy Trinity in the borough aforesaid, on the said 22nd day of March, the day when the said George Thompson ought to have entered into the said service of the said James Hallett under his said contract as aforesaid, at the parish of Holy Trinity in the said borough of Kingston-upon-Hull aforesaid, unlawfully did aid, abet, counsel and procure the said George Thompson the said offence in manner and form aforesaid to commit, that is to say, the said Charles Smith did then and there on the day and year aforesaid in the parish aforesaid, aid, abet, counsel and procure the said George Thompson so as aforesaid not to enter and not to commence his the said George Thompson's service according to the said contract as aforesaid on the said 22nd day of March, or at any time, but therein wholly to make default, contrary to the form of the statute, &c. : And it was thereby adjudged that the said Charles Smith for his said offence should be imprisoned in the House of Correction in the said borough and there kept to hard labour for the space of twenty-one days: These are therefore to command you the said constables, &c., to take the said Charles Smith and him safely

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convey to the said House of Correction, and there to deliver him to the keeper thereof together with this precept. And I do hereby command you, the said keeper of the said House of Correction, to receive the said Charles Smith into your custody in the said House of Correction, there to imprison him and keep him to hard labour for the space of twenty-one days, &c. Given under my hand and seal, &c.

It was then certified that Charles Smith in the first warrant of commitment mentioned, was the same Charles Smith as in the last warrant mentioned. In support of the application there was an affidavit that the contract was not entered into by Thompson in the borough of Kingston-upon-Hull, as stated in the second warrant, but at Sunderland.

*Scotland* now moved for the prisoner's discharge from custody.—The prisoner was convicted under the 11 & 12 Vict. c. 43, s. 5, of aiding and abetting the commission of an offence under the 4 Geo. 4, c. 34, s. 3. The first warrant of commitment is bad on the face of it, since it does not shew that the magistrate had any jurisdiction. (*P. Thompson*, who appeared to oppose the prisoner's discharge, admitted that the first warrant of commitment was bad.) The defect in the first warrant cannot be supplied by the second. Under the 11 & 12 Vict. c. 43, it is necessary that there should be a conviction in the form prescribed, which must be filed with the clerk of the peace: ss. 5, 14; under the 4 Geo. 4, c. 34, s. 3, a *commitment* only is required. The Court will not assume that the one warrant is in substitution of the other. The second warrant alleges that the offence was committed on a different day from that stated in the first, and it also alleges that the prisoner did "aid, abet, counsel and procure," whereas the first only alleges that he did "aid and abet." [*Martin*, B.—The case is

similar to that of an amended writ of execution.] *In re Elmy and Sawyer* (a) is an authority that the Court will not presume that the second warrant was in amendment of the first. [*Martin, B.*—The return states that the second warrant was delivered to the gaoler by the same magistrate as the first (b).] A defective commitment may be supported by a good conviction, but not by another commitment.—Secondly, the second warrant is bad on the face of it. It is no offence, under the 4 Geo. 4, c. 34, for an artificer not to enter into his service if he has his employer's consent or any lawful excuse for so doing: *In re Turner* (c); and accordingly, in the statement of the offence of the principal, it is alleged that he absented himself without the consent of his employer or any lawful excuse; but in stating the offence of the accessory, it is merely alleged that he aided and abetted the principal "so as aforesaid not to enter into his service." Consistently with that, he might have believed, or have been told, that the principal had the consent of his employer or some lawful excuse for not entering his service. The words "so as aforesaid" merely refer to the not entering into the service. No intendment can be made in support of a commitment: *In re Genwood* (d).—Thirdly, the 11 & 12 Vict. c. 43, s. 5, provides for several distinct offences, viz., the aiding, abetting, counselling or procuring; and the commitment ought to state the particular offence of which the prisoner was convicted. *Rex v. Sadler* (e) shews that the commitment would have been bad if the statement of the offence had been in the alternative. On the same principle this warrant is bad, since it is impossible to tell of which offence the prisoner has been convicted.—Fourthly, it appears by the affidavit that the magistrate had no juris-

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(a) 1 A. &amp; E. 843.

(c) 9 Q. B. 80.

(b) See *In re Cross*, 2 H. & N. 354; *Reg. v. Richards*, 5 Q. B. 926.

(d) 2 E. &amp; B. 952.

(e) 2 Chit. 519.



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diction to convict the principal, since he did not enter into the contract at Kingston-upon-Hull, as stated in the warrant, but at Sunderland. [*Martin, B.*, referred to *In re Baker (a)*.] The prisoner is entitled to shew by affidavit that those facts did not exist which were necessary to give the magistrate jurisdiction. He might shew that the contract was one which did not establish the relation of master and servant: *In re Turner (b)*. [*Martin, B.*—It is the province of the Court to decide on the meaning of a written contract: that is different from deciding a disputed question of fact as to whether the contract was made in one county or another.]—He also argued that, as the 5th section of the 11 & 12 Vict. c. 43, rendered the accessory liable to the same forfeiture and punishment as the principal, the magistrate should have adjudicated as to an abatement of wages during the period of imprisonment.—On this point he referred to *In re Baker (a)*.

*P. Thompson* was not called upon to argue in support of the commitment.

*MARTIN, B.*—I am of opinion that none of the objections are sufficient to entitle the prisoner to his discharge. First, it was objected that the first warrant of commitment was bad, and *Mr. Thompson* properly conceded that it might be so treated. Then it was argued that, the first warrant being bad, the defect could not be supplied by reference to the second, and the case of *In re Elmy and Sawyer (c)* was cited as an authority. It is clear, however, on referring to that case, that it did not appear either by the return to the habeas corpus, or the proceedings on the certiorari, that the second warrant was substituted by the justices as an amendment of the first. In this case the return states that

(a) 2 H. &amp; N. 219.

(b) 9 Q. B. 80.

(c) 1 A. &amp; E. 843.

the second warrant was delivered by the same magistrate.— Thirdly, it was contended that the second warrant was bad on the face of it, and the case of *In re Genwood* (a) was cited. It seems to me that case does not establish the proposition that this warrant is bad. We ought to look at the warrant, and see whether it states an offence within the 11 & 12 Vict. c. 43, and in my opinion it does. It states that Smith was duly convicted before a magistrate of the borough of Kingston-upon-Hull: “For that one Thompson, a handicraftsman, did, on the 20th March, at the parish of Holy Trinity in the borough aforesaid, contract with one Hallett, a ship builder, to serve him in the employment of a shipwright, from the 22nd March, for a period not yet expired, the contract being in writing, and signed by the contracting parties; and that Thompson did not enter into the service according to his contract, and that he had not the consent of Hallett or any lawful excuse for not entering into the service. It is not contended that that is not a sufficient statement of an offence within the 4 Geo. 4, c. 34, s. 3; but the objection is, that it is not sufficiently shewn that Smith committed an offence within the 11 & 12 Vict. c. 43, s. 5. That section enacts, “That every person who shall aid, abet, counsel or procure the commission of any offence, which is or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction,” &c. The question is, does this warrant shew that Smith, aided, abetted, counselled or procured the commission of the offence which it is properly alleged that Thompson committed? The warrant proceeds thus: “that Smith, before the committing of the offence by Thompson, and on the day when Thompson ought to have entered into the service of Hallett under

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(a) 2 E. &amp; B. 952.

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his contract, unlawfully did aid, abet, counsel and procure Thompson the said offence in manner and form aforesaid to commit." As at present advised, it seems to me that if the warrant had stopped there, it would have sufficiently alleged an offence by Thompson, and that Smith aided, abetted, counselled and procured him to commit that offence. But the warrant proceeds further: "that Smith did then and there, &c., aid, abet, counsel and procure Thompson so as aforesaid not to enter and not to commence his service." It seems to me, that the words "so as aforesaid" refer to the previous statement as to the manner in which the offence was committed by Thompson, and are not confined to that portion which relates to the not entering into the service. Therefore, in my judgment, there is no objection to the warrant on this ground.—Another objection was, that the "aiding, abetting, counselling and procuring" are distinct offences; and that the magistrate ought to have stated in the warrant the particular offence of which the prisoner was convicted. But I apprehend that the 11 & 12 Vict. c. 43, s. 5, was passed for the purpose of punishing a person who aided in the commission of an offence punishable on summary conviction, and which aiding was not an offence before that Act.—Then it was argued that the magistrate had no jurisdiction, because the principal offence was not committed within the borough of Kingston-upon-Hull. That raises the question whether it is competent for a person to shew by affidavit that the offence of which he is convicted was not committed within the jurisdiction of the convicting magistrate. In this case, to admit an affidavit would be going further than we have yet done, and would be trying by affidavit a matter which ought to be decided by the magistrate; and with respect to which, if he decided wrong, he would, in an action against him, be bound to prove that he had jurisdiction. It was argued

that the question of the magistrate's jurisdiction had been considered by the Court of Queen's Bench in the case of a written contract. That I can well understand, since the Court is the tribunal to decide on the meaning of a written document, and would naturally be desirous of giving immediate relief to a person who was convicted upon a wrong construction of it. But to extend the rule to a case of this kind, would lead to such inconvenience that I am not disposed to do it. Upon these grounds I think that Mr. *Scotland* has failed to shew that the second warrant is bad.

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BRAMWELL, B.—I am of the same opinion. With respect to the question whether we have jurisdiction to inquire where the offence was committed, I think that the decision of the magistrate is final for this purpose, though it may be still open to the party convicted to raise the question in an action against the magistrate.—The only other objection to which I will advert is, that the second warrant is bad on the face of it. Now Mr. *Scotland* admitted that it was sufficiently shewn that Thompson had committed an offence, but he contended that the statement of Smith having aided and abetted the commission of the offence was insufficient, because it did not allege that he knew that Thompson had no lawful excuse for not entering into the service. That argument amounts to this; that a person cannot aid and abet without knowing all the ingredients which constitute the principal offence. I have great doubt of that. If a person aids, abets, counsels, or procures the commission of an act which is unlawful, I think that he ought to be convicted of the aiding, abetting, counselling and procuring. At all events, supposing it necessary to establish the guilt of an accessory, to shew that he knew that the principal had no lawful excuse, the

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proper way to raise the question is to say, "I am not guilty, for, though I told the principal not to go into the service, I did not know that he had no lawful excuse." Therefore, supposing the objection well founded, it would resolve itself into this—that the party was not guilty of aiding, abetting, counselling or procuring. But here the commitment states that he is guilty; if he is not, because he did not know that the principal had no lawful excuse, the magistrate ought to have acquitted him. Therefore, I think that it was not necessary to say that Smith aided and abetted Thompson to commit the offence, Smith knowing that Thompson had no lawful excuse for absenting himself from the service. As to whether the words "so as aforesaid" mean "so not to enter as aforesaid," it is not necessary to decide.

CHANNELL, B.—The substantial question is whether the prisoner is entitled to be discharged. Several objections have been raised, and I am of opinion that all of them must be overruled. With respect to the first warrant, it is unnecessary to say anything, since it was not disputed that it was bad. Then, as to the second warrant, it was argued, first, that it could not be looked at to supply the defect in the first warrant, and the case of *In re Elmy and Sawyer* (a) was cited. But that case is clearly distinguishable, because there the first warrant was withdrawn from the gaoler's possession and another warrant substituted, and it did not appear by whom. Under those circumstances it could not be assumed that the second warrant was delivered to the gaoler by the same justices who had withdrawn the first. The objection fails in this case because the return states that the second warrant was delivered by the same magistrate.—Then, as to the second warrant being bad, the case of *In re Ges-*

(a) 1 A. & E. 843.

wood (a) was cited; but, on a careful examination of that case, I think that it does not apply. There the Court had to consider whether the offence was rightly laid as against the principal: and there was wanting some circumstances necessary to constitute the offence as against him. Here the objection is, not that there is an incomplete statement of an offence as against the principal, but that where Smith is charged as an accessory the statement is deficient. In stating the offence of an accessory, it may or may not be necessary to allege a knowledge by him of the circumstances requisite to constitute the offence as against the principal; on that point I give no opinion: but I agree with my brother *Martin* that, if it is necessary that the warrant should state those facts, this warrant does sufficiently state them. It first states the offence of Thompson, the principal: it then states that Smith "unlawfully did aid, abet, counsel and procure the said G. Thompson the said offence in manner and form aforesaid to commit." I am disposed to think that if the warrant had stopped there it would have sufficiently disclosed a complete offence as against the accessory; but then it goes on,—“that is to say, the said C. Smith did then and there, &c., aid, abet, counsel and procure the said G. Thompson *so as aforesaid* not to enter &c. his service. It is contended that those words refer only to the not entering into the service; but I think that they necessarily refer to the not entering *in manner and form aforesaid*, and therefore the warrant does disclose all the particulars requisite to constitute the offence as against the accessory. It was further contended that the warrant was bad, because to “aid, abet, counsel and procure” were distinct offences, and the warrant did not state of which offence the prisoner was convicted. I do not say that “procuring” may not relate to something different

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from "aiding," but I think that one offence may be properly described by the words "aid, abet, counsel and procure;" there may be an offence which would justify the use of all those words.—With respect to the question of jurisdiction, I am clearly of opinion that this is a case in which the affidavit ought not to be used.

Prisoner remanded.

April 23.

LOBBAN v. COOK.

The 35 Geo. 3, c. 73, s. 179, empowers the vestrymen of Marylebone to make rates, &c., upon persons who shall occupy, &c., any land, &c., according to the yearly rent, &c., to be entered in a book in which there are to be separate columns, one for the arrears and another for the names of the persons charged. By s. 187, where houses are let in parts, &c., the lessor or lessee shall respectively be deemed the occupier, and liable to the payment of

**D**EBT for the use and occupation of certain cellars.—Pleas (inter alia): As to 12*l.* 10*s.* 10*d.*, payment. As to 9*l.* 9*s.* 7*d.*, payment after action brought.—Whereupon issue was joined.

At the trial before *Pollock*, C. B., at the Middlesex sittings after last Michaelmas Term, it appeared that the action was brought to recover 23*l.* for one year's rent of cellars in a house in Berners Street, due the 24th of June, 1857. The defendant had occupied the cellars at the rent claimed for some years. In September 1856, the plaintiff had taken an assignment of a lease of the whole house, subject to an under lease to one Ratford of the upper part of the house, which was occupied as a separate tenement at the rent of 70*l.* a year. The defendant had paid and claimed to deduct four quarters' rates to Midsummer 1856, 12*l.* 10*s.* 10*d.*, and three quarters' rates to Lady Day 1857, 9*l.* 9*s.* 7*d.* The cellars were not separately rated, and the defendant's name

rates according to such proportion of the yearly rent. By s. 188, every person occupying any such part shall be liable to the payment of the said rates, and the occupiers who shall pay such rates shall deduct the same out of the next rent. A tenant of part of a house in the parish of Marylebone, having paid rates which had been made on the occupier of another part who had quitted the premises:—*Held*, that he was not entitled to deduct them as against a landlord whose title had not accrued until after the person rated had quitted the premises.

*Scatchell*, that by the Act in question, in the case of houses let in apartments, the rate must be made either on the landlord in respect of his entire interest, or upon each tenant in respect of such portion of the premises as he occupies.

did not appear on the rate-book. The rates in question had been assessed on Ratford who had taken possession in August 1856 and occupied till March 1856, when he assigned his lease to Toleman. In May Toleman assigned to Nutt, who quitted in August 1856. One Hicks was then in possession till February 1857, after which the premises remained unoccupied till July 1857. The rates being unpaid on the 17th of February, the collector called upon the defendant to pay them. The defendant was then summoned before a justice of the peace, and an order was made upon him for payment of 12*l.* 10*s.* 10*d.* arrears of rates. In July 1857 the defendant was served with a second summons, and an order was made on him for payment of 9*l.* 9*s.* 7*d.*, further rates. The rates were assessed under the 35 Geo. 3, c. 73.

Upon these facts the plaintiff's counsel objected that the defendant was not entitled to avail himself of the payments in question, on the ground that, by the 179th and 187th sections of the 35 Geo. 3, c. 73 (a), the assessment ought to

(a) Sect. 179. It shall be lawful for the vestrymen to make rates "upon all and any person or persons who do or shall inhabit, hold, use, occupy, possess or enjoy any land, ground, house, shop, warehouse, coach-house, stables, cellar, vault, building, tenement or other hereditament within the said parish or limits aforesaid according to the said yearly rent or value thereof; and all the rates to be made and assessed by virtue of this Act shall be entered in one book, &c., in which book, &c., there shall be separate columns, one column for the arrears, &c., and one column for the names of the several persons so to be charged, &c."

Sect. 187. "And whereas there are many houses, buildings, tenements, hereditaments and premises within the limits aforesaid which are taken on leases for years or otherwise, and by the lessees or tenants, and also by landlords or owners thereof, are let out in parts or separate apartments to under tenants and other houses and premises are let ready furnished; be it enacted that the several lessors, lessees, landlords, owners or proprietors of all such houses, &c., so let, &c., in parts or separate apartments, &c., or ready furnished, shall respectively be deemed and taken as the occupier thereof, and shall be liable and subject to the payment

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have been on the person actually occupying the premises: that there ought to have been a separate assessment on each person occupying a separate tenement: that the 187th section of the Act in question did not give the defendant the right to deduct the whole of the rates so paid by him: that the defendant was only liable to rates in respect to the cellar, and that Ratford was liable for the rates for the upper part of the house; and lastly, that 12*l.* 10*s.* 10*d.* had become due before the plaintiff's title accrued. The learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him: the pleadings to be amended if necessary.

*S. Temple* having obtained a rule nisi accordingly,

*W. S. Cross* and *Bell* now shewed cause.—The defendant has no right to deduct the rates in question from his rent. First, the sum of 12*l.* 10*s.* 10*d.* was paid in respect of rates which had become due before the plaintiff had any interest in the premises. Secondly, the rates are bad, because one

of the rates or assessments directed by this Act to be made, raised, levied and recovered according to such proportion of the yearly rent or value of such premises as aforesaid."

Sect. 188. "And for the more easy recovery of such rates or assessments respectively, be it further enacted that each and every person so renting or occupying any such part or separate apartment as aforesaid shall be liable and compellable to the payment of the said rates or assessments and all arrears due thereon, to be recovered in manner hereinafter directed, and the respective occupiers who shall pay such

rates or assessments, or any arrears due thereon, or from whom the same shall be recovered in pursuance of this Act, shall and may deduct the same from and out of the next rent, or any other rent due and payable from him, her or them to such respective lessor or landlord, owner or proprietor, and the receipt for such payment shall be a sufficient discharge for all and every such tenant or tenants, occupier or occupiers, to his, her or their landlord, for so much money as he, she or they shall pay, or shall be levied and recovered on the goods and chattels of him, her or them respectively, by virtue of this Act."

rate was assessed on the whole premises, and not separate rates on the separate occupiers. The effect of the 35 Geo. 3, c. 78, s. 187, is, that where houses are let out in parts the lessors or lessees are to be deemed occupiers, and liable to the payment of rates according to the interest of each. [*Bramwell, B.*—Where the actual occupiers of separate apartments are not assessed, each for what he occupies, the vestrymen may assess some landlord in respect of the entirety of his interest—for that which is occupied by his tenants and no more.] The 179th section clearly shews that the rate is to be a charge upon the person and not upon the premises. It is essential that the name of the party to be charged should appear in the rate-book. If the name of the person made liable to rates is not put upon the rate-book, how can he appeal? The defendant does not shew that the plaintiff was liable to be charged with the rates.

*S. Temple*, in support of the rule.—The defendant's contention is, that where premises are let in parts, if any one occupier is rated any person in the house may be called upon to pay the rate, and he must then resort to his remedy against the persons really liable. There is often a difficulty in ascertaining who is the real owner; and if the Court were to hold that, in cases where a house is held in separate apartments, the vestrymen cannot make a rate unless they can ascertain who are the occupiers and what each holds, there will be great difficulty in rating such property. The 187th section only says that the owner shall pay, not that he shall be rated as occupier. [*Pollock, C. B.*—The 188th section provides for the reimbursement of the tenant. It supposes that the tenant may be compelled to pay something for which he is not chargeable.] The defendant contends that the officers who make the rates may rate the landlord if he is known. If he is not known, they may rate

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any one of the persons occupying any of the several apartments, and may call on any person occupying any of the apartments, whether in the rate-book or not, to pay. [*Martin, B.*—If the rate is made on the owner, it would appear that the officer may go upon the premises and insist on payment from any occupier.]—He referred to *Peppercorn v. Hofman (a)*.

POLLOCK, C. B.—We are of opinion that this rule must be discharged. My brothers all think that the construction of the statute is not doubtful, and if a practice has prevailed which is contrary to its provisions it is illegal and ought to be corrected. I think I was right at the trial. The title of the plaintiff to his rent is clear. The defendant seeks to cut down the claim by establishing his right to avail himself of the sums paid by him for rates; but he has not succeeded in satisfying us of his right to do so. His proposition is clear and intelligible, viz., that in the case of houses occupied in separate apartments the parish officers are entitled to rate any person occupying an apartment in respect of the entire premises; that they may then go upon the premises and distrain upon any occupier whether his name is on the rate-book or not, and that such occupier may then deduct the amount from the next rent. But the clauses of the Act do not bear that out. Here a former occupier, not the present landlord nor any person actually occupying, was rated. The present landlord is not liable to a rate not assessed on himself or any tenant of his.

MARTIN, B., BRAMWELL, B., and CHANNELL, B., concurred.

Rule discharged.

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## HAWKES v. COTTRELL.

May 7.

**ASSUMPSIT** on an attorney's bill.—Plea: Never indebted.

At the trial, before *Watson, B.*, at the Middlesex sittings in this Term, it was proved that the defendant, in Hilary Term, 1854, as next friend for some infants, had given an authority to the plaintiff to institute a suit in Chancery praying that the trusts of a certain settlement might be carried into execution. The suit was for the benefit of the trustees of the settlement, of whom the defendant's brother was one. The defendant had never actually interfered, except by signing the retainer, and contended that, being only nominally a party, the plaintiff was not to look to him for payment. It appeared further, that in August, 1854, an order was made in the suit that the trusts should be carried into execution; and in March, 1855, it was referred to the taxing Master to tax all parties their costs, and directions were given as to the mode in which the income was to be disposed of until the further order of the Court. The plaintiff took no other steps in the suit, and made no application to the Court for the payment of his costs out of the estate, but in November, 1857, he sent in his bill of costs to the defendant, and subsequently wrote several letters applying for payment. On the 14th of January, 1857, the plaintiff's agent wrote to the defendant's brother, who was acting for him, as follows:—"Mr. Hawkes is quite willing to prosecute this suit on being paid costs out of pocket, and upon the clear understanding that both the plaintiff and yourself consider it right that this suit should be proceeded with, and that the plaintiff is fully aware that he is personally

Plaintiff, a solicitor, employed by the defendant a *prochein ami* in a suit in Chancery, sent in his bill before the termination of the suit. The defendant contended that he was not responsible. The solicitor then wrote offering to go on if a certain sum was paid him, and if the defendant would admit that he was personally responsible. The defendant not consenting to this:—*Held*, that the solicitor was entitled to sue for his costs without waiting for the termination of the suit.

*Per Martin, B., and Channell, B.*—The rule, that a solicitor cannot sue for his costs till the termination of the suit in which he is employed, is subject to an exception where the client comes forward and disclaims his liability.

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responsible for all the costs, &c." On the 22nd he wrote : —" If you will let Mr. Hawkes have 80*l*. or 100*l*., he will proceed with the suit at once." After some further correspondence, the defendant's brother wrote :—" Why will not Mr. Hawkes prosecute the suit, and get his costs in the usual way? \* \* \* I will provide funds, so far as monies out of pocket are concerned, which may hereafter be required."

The defendant's counsel contended that the plaintiff was not entitled to recover, on the ground that the suit was not at an end. The learned Judge asked the jury whether they thought the plaintiff's demand of 80*l*. or 100*l*. to go on, was reasonable ; and, the jury having found in the affirmative, he directed a verdict for the plaintiff.

*Mellor* now moved for a new trial on the ground of misdirection.—The learned Judge should have told the jury that the plaintiff was bound to wait till the suit was at an end before commencing his action. [*Martin*, B.—Must an attorney, retained in a Chancery suit which may last many years, wait till it is finally wound up before he can recover his charges? Is it not rather a question of fact what is the understanding of the parties?] In *Stokes v. Trumper* (a), *Page Wood*, V. C., referring to *Whitehead v. Lord* (b), said, that " a solicitor cannot bring his action for a bill of costs till the whole of the business is done, except in a case where there has been a stipulation that, until the client furnishes him with money, he cannot go on with his case." [*Channell*, B.—The word " stipulation " means " notice." ] It was not enough to give notice after the delivery of the bill. [*Martin*, B.—The defendant contended that he was not liable.]

POLLOCK, C. B.—We are all of opinion that the learned

(a) 2 K. & J. 232.

(b) 7 Exch. 691.

Judge was right, and that the plaintiff was entitled to recover. There will therefore be no rule.

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MARTIN, B.—It would be extraordinary if a solicitor were bound to go on with an expensive suit for a client who denies his liability. I think therefore that the rule referred to is subject to another exception, viz., that in case the liability be denied the solicitor may sue his client before he has carried the suit to its termination; and, however reasonable the rule is in ordinary cases, I think it should not be applied where a solicitor is employed in a case which may go on for years in the Court of Chancery.

BRAMWELL, B.—To the rule that a solicitor cannot bring his action before the work upon which he is employed is complete, an exception has very properly been introduced, viz., that if the solicitor asks for funds which are not supplied to him, he may put an end to the retainer and sue. The plaintiff did so in the present case.

CHANNELL, B.—The objection to the plaintiff's right to recover assumes two points, first, that the defendant is liable; secondly, that a suit is pending. If a solicitor conducts a suit to a certain point and then withdraws from it, he is not necessarily entitled to sue. If he wants money, he must ask for funds to carry on the suit, and if they are improperly withheld he may then sue for his bill. But when the client comes forward and says that he is not liable, that is a revocation of the solicitor's authority. The client in effect says: "the suit must no longer be carried on as my suit—you are not my solicitor." If that were not so, I should not be quite satisfied that the suit was at an end. But the defendant says: "as regards future proceedings the suit is at an end."

Rule refused.

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May 5.

MALPASS v. MUDD.

Twelve months after issue joined in an action, a Judge made an order that the plaintiff's attorney should "declare in writing to the defendant's the plaintiff's occupation, &c., and that after five days all further proceedings should be stayed until such delivery." The order having been duly served and disobeyed:—*Held*, that the order was not within the 7th section of The Common Law Procedure Act, 1852, and that an attachment would not lie against the attorney for such disobedience.

*JOYCE* had obtained a rule calling on the plaintiff's attorney to shew cause why, unless a non pros was entered and the defendant's costs in the cause and of the application were paid by the plaintiff or his attorney, an attachment should not issue against the plaintiff's attorney for contempt in not declaring to the defendant's attorney the profession, occupation or quality and place of abode of the plaintiff, pursuant to an order of *Wightman*, J., dated the 29th of July, 1857.

The order was as follows:—"Upon hearing the attorneys or agents on both sides, I do order that the plaintiff's attorney do forthwith declare in writing to the defendant's attorney or agent the profession or occupation or quality and place of abode of the plaintiff in this action, and that after five days all further proceedings be stayed until such delivery."

The order was duly served on the plaintiff's attorney, but was not obeyed. The affidavits on the part of the plaintiff's attorney shewed that the cause was at issue on the 7th of July, 1856, and that notice of trial was given for the then next assizes on the 15th of July, 1857.

*Keane* now shewed cause.—First, as this is a penal proceeding, the affidavits should shew that all the preliminary steps have been taken in order to induce the Court to make an order for an attachment. But it does not appear that a demand in writing was made calling on the plaintiff's attorney to declare whether the writ was issued with his privity, as required by the 7th section of the Common Law Procedure

Act, 1852. [*Martin*, B.—We must assume that the order of the learned Judge was correctly made.] The order may have been made at common law: *Tidd's Practice*, 534, 9th edit. And it must be presumed to have been so made; first, because there was no demand whether the writ was issued by or with the privity of the plaintiff's attorney, which is the foundation of the statutory authority; secondly, because the order is not co-extensive with that prescribed by the statute, but provides a remedy by stay of proceedings in case of disobedience. Therefore, in order to bring the plaintiff's attorney into contempt, the defendant cannot proceed under the 7th section, but should have made the order a rule of Court, and served the rule in the usual way (a). [*Channell*, B.—The Judge's order may be good in part, and bad in part.] This order was made in July, 1857, a year after the cause had been at issue. [*Martin*, B.—The order contemplated by the statute appears to be one to be made on an application at an early stage of the suit.]

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*Joyce*, in support of the rule.—This order is within the statute. Nothing is said about the time at which the demand is to be made. [*Martin*, B.—The form of order under this section given in *Chitty's Forms* (b) expresses that the particulars are to be given by the attorney "within — days, on pain of being guilty of a contempt of Court."] It is not necessary to give notice to the attorney that he will be brought into contempt.—He referred also to *Smith v. Bond* (c).

MARTIN, B.—We are all of opinion that this case is not

(a) It was stated that the Master had refused to allow the order to be made a rule of Court.

(b) 7th ed. p. 70.  
(c) 13 M. & W. 594.



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within the statute. The proper order is that given in Chitty's Forms. But to found an attachment it should be stated or suggested that a demand in writing had been made upon the attorney, so as to bring the case strictly within the enactment of the 7th section of the Common Law Procedure Act, 1854. The rule must be discharged, without costs, partly because the defendant has disobeyed the Judge's order, and partly because the plaintiff has been misled.

BRAMWELL, B.—I do not say that a Judge could not make an order on the plaintiff's attorney for the particulars of the plaintiff's occupation, without the preliminary application mentioned in the 7th section. But such an order would not be within the statute. The present order does not name a time within which the plaintiff's attorney must give the particulars required, but simply commands him to do so, and provides a penalty for not doing it. I doubt if an attachment ought to be granted against the attorney for disobeying an order of this kind. It seems to me that the penalty is that pointed out by the order, viz., a stay of proceedings.

CHANNELL, B., concurred.

Rule discharged, without costs.

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THE NEW BRUNSWICK AND CANADA RAILWAY AND LAND  
COMPANY (LIMITED) v. BOORE.

April 24.

**T**HE declaration stated that the defendant was indebted to the plaintiffs in 60*l.* for two calls of 2*l.* per share, in respect of fifteen shares in the said Company, whereof at the times of making the calls the defendant was and still is the holder, &c.

Pleas.—First: that the defendant was not and is not the holder alleged. Secondly: that the defendant is not a subscriber to the memorandum of association of the plaintiffs' Company, delivered to the registrar pursuant to the Act in that case made and provided, and that his name was entered by the plaintiffs in the register of shareholders of their said Company by the fraud, covin, misrepresentation and concealment of them and others in collusion with them.—Issues thereon.

At the trial before *Watson, B.*, at the Middlesex sittings in the present term, the following facts appeared:—In June 1856, a prospectus was issued for the formation of a Joint Stock Company, with limited liability, to be called "The New Brunswick and Canada Railway and Land Company." On the 19th July, 1856, the defendant paid into the bankers of the proposed Company 50*l.* to a joint account of the persons named in the prospectus as directors; and on the same day filled up and sent to the office of the proposed Company the following printed form of application for shares:—

Under "The Joint Stock Companies Act, 1856," a printed copy of the memorandum of association or articles of association may be signed by a subscriber before the original is signed or registered in pursuance of the 3rd section of that Act; and such signature of the subscriber is an authority for placing his name on the register of shareholders. Therefore where a defendant, having applied for shares in a proposed Company and paid the deposit, signed a printed form of memorandum of association, and by the articles of association agreed to accept certain shares allotted

to him; and some weeks afterwards the original memorandum of association and articles of association were signed and registered, and the defendant's name was placed on the register of shareholders.—*Held*, that the defendant was a shareholder in the Company and liable for calls.

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"To the Directors of the New Brunswick and Canada  
Railway and Land Company.

"Gentlemen,

"Having paid into the bankers of the proposed Company the sum of 50*l*., I request you will allot me 25 Shares of Class A. in the said undertaking; and I undertake to pay the future calls should the Company be proceeded with.

"W. C. BOORE."

On the 29th July the above application was answered by letter from the secretary stating that the directors had allotted the defendant 10 A. and 15 B. shares.

On the 14th August the defendant received from the secretary the following letter, in which was enclosed a printed form of a memorandum of association and articles of association:—

"The New Brunswick and Canada Railway and Land Company (Limited).

"26, Parliament Street, Westminster,  
14th August, 1856.

"Sir,

"I beg to enclose you, in accordance with the New Joint Stock Companies Act, passed last session, a Memorandum and Articles of Association for your signature, which must be given on the first as well as on the last page.

"The signature of this document limits your liability to the shares you have taken, and will obviate the necessity of your signing any deed of settlement; and upon my receiving it with your signature and allotment letter, I will immediately enclose you a scrip certificate for your shares."

"I am, Sir, &c.

"J. W. BYRNE,

"Please enclose bankers' receipt.

"Secretary."

On the 16th August the defendant signed his name on the first and last page of the printed form of memorandum of association and articles of association, and returned it, together with his letter of allotment and bankers' receipt, to the secretary.

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The memorandum of association, which was printed on the first page, was in the form marked A. in "The Joint Stock Companies Act, 1856," but without date. After stating the name of the Company and the other particulars, according to the form in the Act, it concluded thus:—We, the several persons whose names are subscribed, are desirous of being formed into a Company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names.

Name and Address of Subscriber.	Number of Shares taken by Subscriber.
William Charles Boore, Bank of London.	10 A. and 15 B.

Witness to the above Signature,

C. J. H. ALLEN.

The articles of association, which were printed on the second, third and last pages, were headed "Articles of Association of the New Brunswick and Canada Railway and Land Company, Limited;" and had a memorandum at the foot without date in the following form, which was filled up in the defendant's handwriting, but not signed by him:—

"Form of Memorandum consenting to be a Shareholder.

"I, William Charles Boore, of the Bank of London, hereby accept twenty-five shares in The New Brunswick

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and Canada Railway and Land Company, Limited, established under a Memorandum of Association and Articles of Association duly registered; and I consent to be registered as such shareholder accordingly in the register of shareholders of the Company.

“Signature                      of                      in the county of  
 “Witness

“Name and address of witness.

“C. J. H. ALLEN.”

On the receipt of the printed memorandum and articles of association so signed by the defendant, the secretary sent to him the scrip certificates for the shares allotted to him, the receipt of which he acknowledged by letter of the 20th August. On the 25th September a memorandum of association and articles of association, signed by seven persons and duly stamped, were delivered to the registrar of Joint Stock Companies, who thereupon granted a certificate of incorporation. The defendant's name was on the register of shareholders, but he had done no act since the registration of the Company testifying his acceptance of the shares.

It was objected, on behalf of the defendant, that under these circumstances he was not a shareholder in the Company. The learned Judge overruled the objection, and a verdict was found for the plaintiffs.

*Hoggins* now moved for a new trial on the ground of misdirection.—The defendant is not a shareholder in the Company. By the 19 & 20 Vict. c. 47, s. 3, “seven or more persons associated for any lawful purpose, may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of that Act in respect of registration, form themselves into an incor-

porated Company, with or without limited liability." By section 7 "the memorandum of association shall be in the form marked A. in the schedule thereto." By section 9, "the memorandum of association may be accompanied by or have annexed thereto or indorsed thereon articles of association, signed by the subscribers to the memorandum of association, and prescribing regulations for the Company," &c. By section 10, "the articles of association shall be in the form marked C. in the schedule thereto," &c. They shall, when registered, bind the Company and the shareholders therein to the same extent as if each shareholder had subscribed his name and affixed his seal thereto," &c. By section 11, "any person signing a printed copy of the memorandum of association or articles of association shall be deemed to have signed such memorandum and articles respectively."—In the first place, a memorandum of association signed by seven persons must be registered; and a printed copy cannot be issued until after such registration. At the time the defendant signed the printed form of memorandum of association there was no Company. He did not sign a printed *copy* within the meaning of the statute, for the original was not then in existence. The 11th section does not apply to ordinary subscribers, but to the seven or more persons who are projectors of the Company, and it enables them to sign so many separate printed copies of the memorandum, but all such copies must be presented to the registrar at the same time. Here the document which the defendant signed was not presented to the registrar together with the memorandum which was registered. The defendant has done no act since the registration amounting to an acceptance of the shares.

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MARTIN, B.—I am of opinion that there ought to be no rule. The 19 & 20 Vict. c. 47, prescribes two documents as the foundation of joint stock companies, viz., a memo-

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randum of association and articles of association. Generally speaking, the memorandum of association is sufficient; and the Company need not have articles of association, provided they do not entirely adopt the Act. The form of the memorandum of association is given in schedule A. of the Act, and that form has been pursued in this case. The 8th section provides that "every subscriber of the memorandum of association shall take one share at least in the Company: The number of shares taken by each subscriber shall be set opposite his name in such memorandum of association, and, upon the incorporation of the Company, he shall be entered on the register of shareholders as a shareholder to the extent of the shares he has taken." Here the memorandum of association, which is printed on the first page, and the articles of association, which are printed on the second, third and last pages, but not signed by the defendant, are in conformity with the 9th section of the Act. The 11th section provides that "the memorandum of association and the articles of association shall respectively bear the same stamps as if they were deeds." Then comes this provision: "Any person signing a printed copy of the memorandum of association or articles of association shall be deemed to have signed such memorandum and articles respectively, and, where the proper stamp has been duly fixed on such memorandum of association or articles of association, it shall not be necessary to stamp any printed copy so signed." It seems to me therefore, that if seven or more persons propose to form themselves into a joint stock company in conformity with this Act, all they have to do is to provide a memorandum of association, either with or without articles of association, and have it properly stamped, and send copies to the parties applying for shares, and then, by the 11th section, every person who signs a copy professes himself willing to become a member of the Company; consequently, if there are

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five hundred subscribers, they might sign their names to five hundred different copies. Then comes the 13th section, which provides for the incorporation of the Company; but, in order to obtain that, seven or more persons must subscribe their names to the memorandum of association, and otherwise comply with the requisitions of the Act in respect of registration. It is immaterial when that is done; and there is no provision in the Act which requires that the names of the seven persons shall be communicated to the subscribers who sign copies of the memorandum; though, no doubt, the memorandum must be the same in terms as the document which the subscribers sign, or they are not bound by it. The object of the enactment was to prevent the trouble of sending round the original memorandum to all the subscribers, who might perhaps reside at a great distance from each other; and though, for the purpose of obtaining registration, seven persons at least must subscribe, it is not necessary that they should all sign the same memorandum, but each subscriber may sign a printed copy, and, if one bears the proper stamp, the Company may be registered. Here, seven persons signed a memorandum of association duly stamped, and it was taken to the registrar of joint stock companies, who registered it, and gave a certificate of incorporation, and thereupon the Company became incorporated. Therefore, all the requisites of the Act have been complied with. Then, by the 26th section, "the register of shareholders shall be evidence of any matters by the Act directed or authorized to be inserted therein," that is, unless the contrary be shewn. Here, not only was the contrary not shewn, but it appeared that the Act had been strictly complied with.

CHANNELL, B.—I am of the same opinion. I confess that during a part of the argument I was not free from



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some doubt, but I now agree that there ought to be no rule. The first question is, whether this Company was formed at all. Now it is clear that a Company was projected, called "The New Brunswick and Canada Railway and Land Company," and that a memorandum of association was signed by seven persons and duly registered as required by the Act. I guard myself against any expression of opinion as to whether, if six persons only had signed the memorandum of association, and the defendant's signature was necessary to complete the seventh, it would have been sufficient under the 3rd section of the Act for the defendant to have signed a printed copy of the memorandum; though I concur in the view of my brother *Martin* as to the 11th section. The point however does not arise here, because the memorandum of association and articles of association were signed by seven persons, and were duly registered as required by the Act. Then, this Company having been formed, the next question is, whether there was any evidence that the defendant was a shareholder in it. The 26th section makes the register of shareholders *prima facie* evidence of the matters therein contained. The defendant's name is found on the register of shareholders. Then, how does he seek to displace it? Leaving the printed copy of the memorandum out of the question, we find his name on the register of the Company. Then the printed copy of the memorandum is produced with his signature to it. That, so far from displacing the *prima facie* evidence, confirms it. My only doubt was whether a memorandum which did not contain the names of all the subscribers could, under the 11th section, be used for any purpose, but I am clearly of opinion that it is evidence to shew that the person who signed it is a shareholder.

WATSON, B.—I retain the opinion which I expressed at the trial, viz., that this Company was a corporation under

"The Joint Stock Companies Act, 1856;" that by the production of the register and printed copy of memorandum of association the defendant was shewn to be a shareholder in the Company; and that there was no evidence to negative the *prima facie* case against him. With respect to this Company being a corporation, that fact is not in issue: but, if it were, the 13th section provides that when the registrar of joint stock companies has certified that the Company is incorporated, the shareholders shall be a body corporate having a perpetual succession and a common seal. Therefore we start from this point, that there was an incorporated Company on the 25th September, 1856. Then, was the defendant a shareholder in that Company? The statute requires a register of shareholders, and the defendant's name was on that register. He was not called, nor was there any evidence on his part. In support of the plaintiffs' case the register was produced, and it was proved that in the course of the formation of the Company the defendant applied for shares; that twenty-five were allotted to him; that he paid the deposit and received the scrip: that before the Company was registered, the defendant signed a printed form of a memorandum of association which contained all that was in the memorandum afterwards registered, and to which the signatures of seven persons were attached, being the number of persons requisite to form the Company. Then, what is the meaning of a memorandum of association? I understand the Act thus,—seven or more persons may associate themselves in order that they may ultimately form an incorporated Company. They must have a memorandum of association, and that constitutes the terms upon which the Company is founded. The memorandum must be signed by at least seven persons and registered, whereupon a certificate of incorporation is given and the Company becomes an incorporated Com-

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pany. The Act does not mean that a memorandum signed by seven persons must be registered before a printed copy is signed; but that a printed copy may be signed either before or after. I cannot doubt that is the true construction of the Act, because otherwise all the original subscribers must sign the memorandum which is registered, whereas it is only required to be signed by seven persons. It seems to me that a printed copy of the memorandum may be signed, for the purpose of forming the Company, before the memorandum signed by seven persons is registered, and that the signing the printed copy is an authority to place the name of the person so signing it on the register of shareholders. I am satisfied that the plaintiffs proved, not only a *prima facie* case, but that the defendant was in fact a shareholder.

Rule refused.

April 21.

WILLIAMS v. CLOUGH.

Declaration that defendant was possessed of a granary and ladder leading up to it; that the ladder was wholly unfit and unsafe for use; that the plaintiff was a servant for hire of the defendant; that the defendant knowing the premises wrongfully and deceitfully ordered the plaintiff to carry corn up the ladder into the granary: that the defendant believing the ladder to be fit for use, and not knowing the contrary, did carry corn up the ladder to the granary, and by reason of the ladder being unsafe the plaintiff fell from it.—*Held*, on demurrer, that the declaration was sufficient.

**DECLARATION.**—That at the time of the grievances, &c., the defendant was possessed of a granary and ladder leading from the ground up to the said granary, which ladder was at the time aforesaid wholly unfit and unsafe for use by any person carrying corn up the same; and the plaintiff, at the time aforesaid, was a labourer and servant for hire of the defendant: yet the defendant, well knowing the premises, wrongfully and deceitfully ordered and directed the plaintiff, as such servant as aforesaid, to carry corn for the defendant up the said ladder into the said

plaintiff to carry corn up the ladder into the granary: that the <sup>plaintiff</sup> defendant believing the ladder to be fit for use, and not knowing the contrary, did carry corn up the ladder to the granary, and by reason of the ladder being unsafe the plaintiff fell from it.—*Held*, on demurrer, that the declaration was sufficient.

*Semble*, that if the plaintiff had the means of knowing that the ladder was unsafe it would have been a defence, but the defendant should have pleaded it.

granary, and the <sup>plaintiff</sup> ~~defendant~~ therefore, in obedience to the said order of the defendant, and believing the said ladder to be fit and proper for use for the purpose aforesaid, and not knowing the contrary, did carry corn as aforesaid for the defendant up the said ladder in order to carry the same into the said granary, but by reason of such ladder being unsafe and unfit for the purpose aforesaid, the plaintiff, whilst so in the employ of the defendant, and whilst so fulfilling his said duty, &c., fell from the ladder, &c.

Demurrer and joinder.

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*Garth*, in support of the demurrer.—It is the duty of a servant to take all proper precautions for his own protection. If he fails to do so, his master is not responsible: *Priestley v. Fowler* (a). But it is consistent with this declaration that the plaintiff had notice from the defendant that the ladder was unsafe, or had the means of knowing its insecurity. A servant is at least as likely as his master to know whether a ladder which he is in the habit of using is safe or not. In *Dynne v. Leach* (b), which was an action under the 9 & 10 Vict. c. 93, against a master by the administratrix of a servant killed while using machinery, *Bramwell*, B., said :—" It may be inhuman for an employer to carry on his works so as to expose his workmen to the peril of their lives ; but it does not create a right of action for an injury which it may occasion, where the workman has known all the facts and is as well acquainted as the master with the machinery, and voluntarily uses it." [*Bramwell*, B. —There are two questions ; first, whether it is material that the plaintiff had not the means of knowing that the ladder

(a) 3 M. & W. 1.

(b) 26 L. J., Exch. 221. The case was not reported in 2 H. & N., because no point of law was decided by it. There was no

evidence that the machinery used was improper, and it was consistent with the facts that the workman's own negligence caused his death.

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was unsafe; secondly, if so, whether the want of such means of knowledge should be averred in the declaration. *Martin, B.*—The declaration alleges deceit. The declaration seems warranted by the case of *Roberts v. Smith (a)*.] There was in that case an allegation that the plaintiff had done all things necessary to entitle him to maintain the action.

*J. Brown*, for the plaintiff.—It is not necessary for a plaintiff to negative every conceivable state of circumstances which may afford a defence. If the plaintiff had the means of knowing the insecurity of the ladder, the defendant should have alleged it by way of plea.—[He was then stopped by the Court.]

*POLLOCK, C. B.*—We are all of opinion that this declaration is sufficient, and the plaintiff is therefore entitled to judgment.

*MARTIN, B.*—It is not necessary that a declaration should negative every possible state of facts which might afford a defence. The allegations of the declaration in the present case appear to be sufficiently precise.

*BRAMWELL, B.*—I abide by the opinion I expressed in the case referred to, that a master cannot be held liable for an accident to his servant while using machinery in his employment, simply because the master knows that such machinery is unsafe, if the servant has the same means of knowledge as the master. I should be inclined to say that the declaration is good or bad, as it does or does not negative the servant's means of knowledge. That, however, is a mere question of special pleading. And, as the Lord

(a) 2 H. & N. 213.

Chief Baron and my brothers *Martin* and *Channell* are of opinion that the declaration is good, it is not necessary that I should further inquire whether it ought to contain, or does contain, such an averment.

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CHANNELL, B.—I concur with the rest of the Court in thinking the declaration good.

Judgment for the plaintiff.

JOHNSTON v. SUMNER.

May 7.

**ACTION** for goods sold.—Plea: Never indebted.

At the trial, before *Pollock*, C. B., at the Middlesex Sittings after last Michaelmas Term, it appeared that the action was brought by plaintiff, a milliner in London, to recover the sum of 160*l*. for dresses and articles of millinery supplied by him to the defendant's wife. The defendant married in July 1849, on which occasion his father entered into a covenant to pay him 500*l*. a year, and Mrs. Sumner's mother covenanted to pay her 200*l*. a year for her separate use until the death of her mother, when she would come

During cohabitation, a wife has an implied authority as agent of her husband to pledge his credit for necessities suitable to her station, notwithstanding any private agreement between them.

If a husband turns his wife away and she is unable to

maintain herself, she has an authority of necessity to pledge his credit for necessities supplied to her.

*Sed quare*, whether, if a labouring man turns his wife away, she being capable of earning, and earning as much as he did; or if a man turned his wife away she having a settlement double his income in amount, the wife in such cases could bind the husband.

If a wife leaves her husband without his consent, she has no authority whatever to bind him.

Where husband and wife part by mutual consent, and nothing is said, and she cannot maintain herself, a jury may infer that the husband meant that his credit should be pledged: and *semble*, even if at parting he said otherwise.

But where husband and wife part by mutual consent, and the wife is capable of supporting herself or has a sufficient allowance, the burden of proof is on the person who has trusted the wife to shew an authority either express or implied to pledge her husband's credit.

A husband and wife separated by mutual consent when it was verbally agreed that the wife should continue to receive 200*l*. a year, which had been settled on her on the marriage.—*Held*, that the husband was not liable for necessities supplied to his wife, the plaintiff having failed to shew that her allowance was insufficient, or that she had any authority to pledge her husband's credit.

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into possession of her mother's property. The defendant and his wife went to reside abroad, and in 1850 they separated by mutual consent, when it was verbally agreed that Mrs. Sumner should continue to receive the 200*l.* a year for her sole use. On parting, the defendant left with her 70*l.* In the year 1851, Mrs. Sumner, who resided with her mother at Frankfort, wrote to the plaintiff for some dresses, which were supplied to her: she afterwards came with her mother to the plaintiff's shop in London, and ordered other articles. At this time the plaintiff was not aware that she was married, and made no inquiry about it; but, having afterwards ascertained the fact, he brought the present action against her husband.

It was submitted on behalf of the defendant, that under these circumstances he was not liable. The plaintiff's counsel requested the learned Judge to leave to the jury the question whether Mrs. Sumner had an allowance sufficient for her station in life. The learned Judge was of opinion that there was no evidence for the jury, and nonsuited the plaintiff.

*Edwin James*, in the following Term, obtained a rule to shew cause why a new trial should not be had on the ground of misdirection, against which

*Lush* and *T. Chitty* shewed cause (April 22).—The goods were not supplied on the credit of the defendant. Where a husband compels his wife to leave him, he gives her an implied authority to pledge his credit for necessaries suitable to her station in life; but where husband and wife separate by mutual consent, the implied authority arising from cohabitation ceases, and an express authority must be proved. There is good reason for the distinction, since in the former case the husband is bound to maintain his wife, but in the latter he violates no contract. In *Todd v.*

*Stokes* (a) Lord *Holt* did not leave to the jury whether the wife's allowance was sufficient, but nonsuited the plaintiff because he had notice that the defendant and his wife had separated. *Nurse v. Craig* (b) for the first time decided, that where a husband covenants with a third party to make his wife a certain allowance, and fails to do so, if such third party supply her with necessaries he may maintain an action, in respect of them, against the husband. There *Chambre, J.*, observes that a provision for a separate maintenance is of modern introduction. That case shews that, if the wife consents to an allowance agreed on by the parties as sufficient for her maintenance, the jury are not to determine the question of sufficiency. [*Pollock, C. B.*, referred to *Corbett v. Poelnitz* (c) and *Marshall v. Rutton* (d).] In *Roper on Husband and Wife*, p. 108, 2nd edit., it is said that there are four exceptions to the rule that a wife cannot bind her husband by her contract without his authority. The first arises from the circumstance of cohabitation, in which case the wife has an implied authority as the *agent* of her husband to bind him for necessaries. The second is where the husband allows his wife to use articles bought by her, though not necessaries. The third is where the wife purchases necessaries and pays for them with money borrowed by her from a stranger. The fourth is where the husband turns his wife out of doors, without provision and without a sufficient cause; or when he, by cruel treatment, obliges her to leave her home. But, after the husband and wife have consented to an arrangement for separation by which she is willing to receive a certain allowance for her maintenance, the law will not presume that his liability continues where the wife lives apart from her husband, and the tradesman is bound to make strict inquiry as to the

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SUMNER.(a) 1 *Ld. Raym.* 444; 1 *Salk.* 116.(b) 2 *N. R.* 148.(c) 1 *T. R.* 5.(d) 8 *T. R.* 545.



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terms of separation: *Ozard v. Darnford* (a). That the agreement for separation is a material element appears from the judgment of the Court in *Thompson v. Hervey* (b). The authorities apparently adverse to this view are distinguishable. In *Hodgkinson v. Fletcher* (c) there was no agreement as to the allowance to the wife; and Lord *Ellenborough* observed that its sufficiency was not proved by her mere acquiescence, since she might be willing to accept a provision wholly inadequate because she could get no more. In *Holder v. Cope* (d) it was admitted that the sufficiency of the allowance was a question for the jury. In *Reeve v. The Marquis of Conyngham* (e) the plaintiff's counsel did not deny that the allowance to the defendant's wife was sufficient, but contended that it ought to have been shewn that the plaintiff knew of it. Notice to the tradesman of the allowance is immaterial: *Mizen v. Pick* (f).—They also referred to *Manby v. Scott* (g); 2 Smith's Lead. Cas. 363.

*Edwin James* and *H. Lloyd*, in support of the rule.—The principle deduced from the authorities is thus stated in 2 Smith's Lead. Cas. 389, 4th edit. "From the above it will appear that, if the husband and wife separate *by mutual consent*, the wife has an implied authority to bind the husband for articles suitable to her degree, unless she have an adequate allowance, *and* unless that allowance be duly paid to her." Then, who is to judge of the adequacy of the allowance? Later decisions have established that it is a question for the jury. The law on this subject is fully and correctly stated by Lord *Abinger* in *Emmett v. Norton* (h).

(a) 1 Sel. N. P. 275, 10th ed.

(b) 4 Burr. 2178.

(c) 4 Camp. 70.

(d) 2 Car. & K. 437.

(e) 2 Car. & K. 444.

(f) 3 M. & W. 481.

(g) 1 Lev. 4.

(h) 8 C. & P. 506.

In *Lane v. Ironmonger* (a), *Parke*, B., said, "The whole turns upon the question of the husband's authority; and it is for the jury to say whether the wife had any such authority, and whether the plaintiff, who supplied her with these articles, must not have known that she was exceeding her husband's authority to pledge his credit." It is not like the authority of principal and agent, because the husband has no power to countermand it. Where the husband and wife are living together, an authority is implied; but where they are living apart, the burthen of proof is shifted and an authority must be shewn. In the analogous case of an infant, the question as to necessities is one for the jury. The fact that the wife consented to receive a certain fixed allowance is immaterial; it is still a question for the jury whether the allowance is adequate according to her husband's station in life: *Liddlow v. Wilmot* (b). The case is different where a deed of separation is executed, because there the trustees have the power of enforcing the husband's covenant to pay the wife's allowance.

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• The judgment of the Court was now delivered by

**POLLOCK, C. B.**—This case was tried before the Lord Chief Baron, at the Middlesex Sittings after Michaelmas Term, when the plaintiff was nonsuited. Mr. *James* moved, in Hilary Term, for a new trial, and cause was shewn this Term; and I have now to state the judgment of the Court.

We have not to interpret a positive law, but to ascertain the principle on which a husband has been held liable for goods furnished to his wife, and see how far, or whether at all, it applies to this case. Now, the principle seems to be merely that of *agency*; the wife is spoken of as the husband's agent, as having his authority, and the declaration

(a) 13 M. & W. 368.

(c) 2 Stark. N. P. 86.

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is as upon a contract by him through his wife as an agent. The question to be resolved then is, had the wife authority to pledge the husband's credit? 2 Smith's Leading Cases, 385, *Manby v. Scott*, *Lane v. Ironmonger* (a). Now, authority may be express or implied, or arising from conduct, as where one person holds out another in such way as to induce a belief of authority; or there may be an authority from necessity, as in the case of the captain of a ship under certain circumstances: see the reasoning in *Manby v. Scott*, 1 Smith's Leading Cases, 350. If a man and his wife live together, it matters not what private agreement they may make, the wife has all usual authorities of a wife. If the husband turns his wife away, it is not unreasonable to say she has an authority of necessity; for she by law has no property, and may not be able to earn her living: but we should hesitate to say that, if a labouring man turned his wife away, she being capable of earning, and earning as much as he did; or if a man turned his wife away, she having a settlement double his income in amount, the wife in such cases could bind the husband: see per Lord *Ellenborough*, *Liddlow v. Wilmot* (b), and *Clifford v. Laton* (c).

But now comes the case of where the wife leaves willingly. If she leaves without her husband's consent it is clear she has no authority. She has none of the ordinary authorities of a wife, for she is not in the ordinary case of a wife, viz., living with her husband; she has no necessary authority, because she has brought her condition on herself and can return. She has no express or implied authority. Now, suppose she leaves *with* his consent, as before, she has not the ordinary authority of a wife living with her husband, nor any authority of necessity. Her authority therefore

(a) 13 M. &amp; W. 368.

(b) 2 Stark. N. P. 86.

(c) 3 C. &amp; P. 15.

must be express or implied. In the present case there was no express authority, and consequently the question is reduced to whether there was an implied one. Now, it is easy to understand that where husband and wife part by mutual consent, and nothing is said, and she has no means and cannot maintain herself, a jury might infer the husband meant that his credit should be pledged. Nay, even though at the parting he said otherwise, a jury might perhaps be justified in saying (though we do not affirm this) that his acts and not his words must be looked at, and that he meant otherwise. But upon what principle can an authority be implied, where they part upon terms negating any authority in her, and making a provision for her not shewn to be insufficient for her maintenance? See per C. J. *Manfield*, 2 B. & P. N. R. 162.

In the cases put before—a labouring man and his wife part by consent, each capable of earning, each earning an equal amount; or, a man and his wife part by consent, the wife having double the husband's income—has the wife any implied authority to pledge his credit? It seems to us that the burthen of proof is on the person who has trusted the wife; and that, when the husband and wife are living apart, the wife's authority is not shewn where it is proved she is living apart from her husband by mutual consent with an agreement, as between him and her, that she is not to pledge his credit, and with an allowance not shewn to be inconsistent with that being the real intention. Indeed, it is difficult to see how the wife, leaving her husband with his consent, can be in a different position to the wife leaving without. In both cases her leaving is voluntary—in neither case is it his act; in one case he dissents, in another he assents; but the act is equally hers. Where is the line to be drawn? To what extent is he to dissent? Must he lock up his house, and if she escapes get her back

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by force or legal proceedings? Or would it be enough if he said: "if you go, it is without my consent; but I will not trouble myself to force you?" One may imagine a man wishing his wife to stay for the sake of their children, and dissenting from her leaving, and yet not thinking it right to constrain her. What is the law in such a case? We think the more convenient rule is that which we have suggested, viz., an authority must be shewn, and shewn in one or the other of the ways we have mentioned.

This rule puts the burthen of proof on the right person. It gives the husband that to which he is fairly entitled, viz., to have the authority affirmatively shewn; consequently, involving the shewing of the wife's wants, including her allowance or other means; and gives the husband a benefit he can now with difficulty get, viz., the benefit of his credit having been shewn sufficiently pledged by her. We think, therefore, authority must be shewn in all cases where the husband is sought to be made liable for his wife; though for the decision of this case it would be enough to say, that the wife's living away from her husband, with nothing to shew any authority was in fact given, and with an allowance or arrangement not involving such authority, but negating it, the defendant is not liable for her debts.

We have now to examine the authorities. The heads of liability and exemption are remarkable, as given by Roper on Husband and Wife, vol. 2, p. 108. 1st. Non-liability; then 1st an exception from cohabitation. 4th: where in breach of his duty he turns his wife out of doors, without provision. The author then says (a): "5th. We shall now consider the circumstances which will discharge the husband from his obligation to keep and maintain his wife," and he says, "the husband will be exempt from this duty

in all cases where the nature of the transaction is such as to preclude all possibility, and even propriety, to raise an implication that the wife acted under his authority. Thus, if the wife leave her husband's house of her own accord, and without a sufficient provision, the law, for want of cohabitation (which is the foundation of his liability to support her), cannot continue the implied authority from him to her to purchase necessities which from her own act he was not bound to furnish." He makes no separate head as to the wife leaving with the husband's consent, and we may therefore infer that he thought it included in a previously named class, which could only be the fifth, where she leaves her husband, and he is therefore not liable. In 2 Smith's Leading Cases, 389, it is said:—"From the above it will appear that, if the husband and wife separate by mutual consent, the wife has an implied authority to bind the husband for articles suitable to her degree, unless she have an adequate allowance, and unless that allowance be duly paid to her." If this means only that the authority may be implied where the allowance is inadequate or not paid, is it not inconsistent with what is above suggested? It may be that in such a case a jury is warranted in implying authority. If it means more, the cases do not warrant it. In *Ozard v. Darnford* (a) Lord Mansfield says: "As in all cases the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make *strict inquiry as to the terms of separation*: for in such cases he trusts her at his peril." In that case the husband was made liable because he had not paid the allowance; therefore, it was not unreasonable to imply that he meant, if he did not pay it, his wife might pledge his credit. *Hodgkinson v. Fletcher* (b) does not shew the burthen of proof was not

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(a) 2 Sel. N. P. 275, 10th ed.

(b) 4 Camp. 70.

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on the plaintiff, though the expression used by Lord *Ellenborough* is, "the husband must prove he paid an adequate allowance." In *Liddlow v. Wilmot* (a), the husband was living with another woman, consequently the wife was necessarily away. In *Emmett v. Norton* (b) the question did not arise; and in *Nurse v. Craig* (c) the allowance agreed on was discontinued, so that a condition of things arose unprovided for by the agreement of separation. Then, in *Willson v. Smyth* (d), a decree for alimony and payment of it were held to preclude all question of sufficiency. In *Holden v. Cope* (e) the question was not on whom was the burthen of proof.

Upon the ground then that the question is one of the wife's authority; that the creditor had to make that out; that to make it out he must shew that the wife, living separate, *did so* under circumstances from which an authority might be implied; and, assuming that a separation by consent and no allowance, or an insufficient allowance, would give rise to such implication (which we doubt), we are of opinion that it was for the plaintiff in this case to shew the allowance was insufficient; and, that not being done, the nonsuit was right, there being no evidence that the plaintiff was authorized to charge the husband.

Rule discharged.

(a) 2 Stark. N. P. 86.

(b) 8 C. & P. 506.

(c) 2 N. R. 148.

(d) 1 B. & Adol. 801.

(e) 2 Car. & K. 437.

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WILLIAM BURLING v. HARLEY and PLATER.

Feby. 12.

**TROVER.**—The action was commenced on the 9th of April, 1857, and the venue was laid in the county of Middlesex.

Plea: Not guilty. (By statutes 9 & 10 Vict. c. 95, s. 138—13 & 14 Vict. c. 61, s. 19—15 & 16 Vict. c. 54, s. 6).—Whereupon issue was joined.

At the trial, before *Martin, B.*, at the Middlesex Sittings after Trinity Term, 1857, it appeared that the defendant *Harley*, having obtained judgment in the Bow County Court of Essex, against *James Burling*, the son of the plaintiff, caused an execution to be issued against his goods. A warrant was delivered to the defendant *Plater*, the bailiff of the County Court, under which a person named *Garlett*, his assistant, took the goods of the plaintiff in the county of Essex, on the 30th of December, 1856, the defendant *Harley* not being present. The goods were sold on the 7th of January.

Under these circumstances, the defendants' counsel objected that *Harley*, not having been present at the time of the seizure, was entitled to a verdict; that *Plater* was protected by the 138th section of the 9 & 10 Vict. c. 95, and the venue, not having been laid in the county where the fact was committed, and the action not having been commenced within three calendar months, the plaintiff was not entitled to recover against him. The learned Judge overruled the objection; and, under his direction, the jury found a verdict against the defendant *Plater*, and for the defendant *Harley*.

The bailiff of a County Court who, acting bona fide, has by mistake seized the goods of one person under a County Court execution against another, is entitled to the protection of the 138th section of the 9 & 10 Vict. c. 95, as in respect of a thing "done in pursuance of the Act."  
Dissentiente *Martin, B.*



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*Hawkins*, for the defendant Plater, in Michaelmas Term, had obtained a rule for a new trial, on the ground that the learned Judge misdirected the jury in telling them and in holding that the defendant Plater was not entitled to the protection or privileges afforded by the 138th section of the 9 & 10 Vict. c. 95, or by the 19th section of the 13 & 14 Vict. c. 61, or the 6th section of the 15 & 16 Vict. c. 54; against which

*Daly* shewed cause, in Hilary Term (Jan. 12) (a).—The 13 & 14 Vict. c. 61, s. 19, applies only to actions for things “done in obedience to any warrant.” That enactment therefore has no application to the present case. The seizing of the goods of the plaintiff was not a thing “done in pursuance of the Act” within the meaning of the 9 & 10 Vict. c. 95, s. 138. In *Edge v. Parker* (b), where the assignees of a bankrupt entered the premises of a third person to seize goods which were the property of the bankrupt, it was held that their act was not “done in pursuance of the statute” within the meaning of the 6 Geo. 4, c. 16, s. 44. [*Martin*, B.—That was in pursuance of the right of property, not in pursuance of the Act.] *Parton v. Williams* (c) will be relied on by the defendant; but the words of the 24 Geo. 2, c. 44, s. 8, are much larger than those of the section now in question. In *Lawson v. Dumlin* (d) it was held that a Trinity House pilot, who, in navigating a vessel, negligently ran against and damaged another vessel, was not entitled to the protection of the 84th section of the Pilot Act, 6 Geo. 4, c. 125. Though he was piloting the vessel in pursuance of a duty cast upon him by the statute, his negligence was not “done in pursu-

(a) Before *Pollock*, C. B., *Martin*, B., *Watson*, B., and *Channell*, B.

(b) 8 B. & C. 697.  
 (c) 3 B. & Ald. 330.  
 (d) 9 C. B. 54.

ance of the Act." *Maule, J.*, there said: "If the statute had meant to restrict actions against pilots to six months, it would no doubt have said so."

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*Hawkins*, in support of the rule.—The defendant, an officer of the County Court, was endeavouring to execute a warrant, and bonâ fide believed that he was seizing goods liable to the execution. The question is, not whether he was strictly justified in what he did, but whether he believed that he was acting in pursuance of the authority. The protection is required for an officer who acts illegally, believing himself to be right. [*Watson, B.*—No one but the bailiff of the County Court could have executed this warrant.] In *Edge v. Parker (a)* the assignees had no right to enter the house at all, and could not have supposed that they had authority to do so. Here, but for the statute, the bailiff would have had no authority, and could not have professed to act as he did. [In addition to cases referred to in the judgment, he cited *Booth v. Clive (b)*, *Horn v. Thornborough (c)*, *Newton v. Ellis (d)*, *Daniel v. Wilson (e)*, *Smith v. Wiltshire (f)*, *Theobald v. Crickmore (g)*.]

*Cur. adv. vult.*

The judgment of the majority of the Court was pronounced in Hilary Vacation (Feb. 12); and the following reasons for the judgment were handed to the reporters in Trinity Term, by

*WATSON, B.*—The majority of the Court, the Lord Chief Baron, my brother *Channell* and myself, are of opinion that

(a) 8 B. & C. 697.

(b) 10 C. B. 827.

(c) 3 Exch. 846.

(d) 5 E. & B. 115.

(e) 5 T. R. 1.

(f) 2 B. & B. 619.

(g) 1 B. & Ald. 227.

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this rule should be made absolute : my brother *Martin* does not concur therein.

The question is, whether the bailiff of a County Court, in seizing the goods of the plaintiff under a County Court execution against another person, is entitled to the benefit of the protecting clauses of the County Court Act, 9 & 10 Vict. c. 95, s. 138. We think he is entitled to that protection.

That statute directs (s. 95) that all writs should issue to the high bailiff. The bailiffs to be appointed under the Act are (s. 31) to appoint assistants, to be allowed by the judge, and who are to execute all writs of *fi. fa.* Section 138 enacts, that all persons acting in the execution of the Act are entitled, for anything done in pursuance of the Act, to a certain protection.

In the numerous cases decided on similar provisions in other acts of parliament, the Courts have uniformly held, that when the defendant *bonâ fide* believes he is acting in pursuance of the Act, but in so doing is guilty of a trespass or excess, or has acted erroneously, he is notwithstanding entitled to the benefit of such protecting clause, whether such trespass or wrongful act be in respect of place : *Hughes v. Buckland* (a), *Prestidge v. Woodman* (b); or time : *Cann v. Clipperton* (c); or person : *Huggins v. Waydey* (d), *Ward v. Lee* (e); or in circumstances : *Davis v. Curling* (f), *Braham v. Watkins* (g), *Tarrant v. Baker* (h).

The case of *Parton v. Williams* (i) comes nearer to, and, in our opinion, governs this case. There a constable, under a warrant to seize the goods of A., took the goods of B.; and he was held to be entitled to the protection given by the

- (a) 15 M. & W. 346.
- (b) 1 B. & C. 12.
- (c) 10 A. & E. 582.
- (d) 15 M. & W. 357.
- (e) 7 E. & B. 426.

- (f) 8 Q. B. 286.
- (g) 16 M. & W. 77.
- (h) 14 C. B. 199.
- (i) 3 B. & Ald. 330.

stat. 24 Geo. 2, c. 44, s. 8. It was urged upon us that this case is governed by the decision in the case of *Edge v. Parker* (a), where it was held that the assignees of a bankrupt who, intending to seize the goods of the bankrupt, took the goods of a third person, were not entitled to the benefit of the protecting clauses of the Bankrupt Act. We think that case is essentially different from the present, for the assignees were not acting by direction or in pursuance of the Bankrupt Act, but were claiming property under a title direct from the Commissioner of Bankruptcy. This distinction is clearly pointed out in the judgment, where *Bayley, J.*, says: "The clause requires that any action, brought against any person for anything done in pursuance of the Act, must be brought in six months. Was, then, the act done by the defendant done in pursuance of the statute? That Act does not give the assignees any express power to seize the goods of the bankrupt, but vests the property in them, and clothes them with all the rights resulting from the ownership of property. But, although the ownership is given to them in this manner, their acts as owners are not done in pursuance of the statute. The right construction of the clause appears to be this—if the assignees do an act directed by the statute and do it erroneously, they are protected; but if they do it as owners and not directed by the statute, the act is not done in pursuance of the statute." Although the assignees for this reason were not within the prohibitory clauses, it is clear that the messenger acting under the warrant of the Commissioners would have been protected. In the case of *White v. Morris* (b), the bailiff of a County Court set up this defence, which prevailed. It is true that the point was not taken in that case. We think that the clause is for the

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(a) 8 B. &amp; C. 697.

(b) 11 C. B. 1015. See also *Tarrant v. Baker*, 14 C. B. 199, 208.

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protection of bailiffs, as otherwise they might be exposed to many vexatious suits. Under these circumstances we think that the bailiff of the County Court was a person acting in execution of the Act, and that he was acting in pursuance thereof, and therefore entitled to the protection given by the Acts in question, and the rule for a new trial must be absolute.

Rule absolute.

April 30.

LINFORD v. LAKE.

In trespass for false imprisonment, the defendant, under the plea of "not guilty," may give in evidence the excuse, if it merely goes in mitigation of damages, though he cannot do so without a special plea if it amounts to a justification.

**T**RESPASS for an assault, giving the plaintiff into custody of a policeman and causing him to be imprisoned. Plea.—Not guilty.

At the trial before *Pollock*, C. B., at the London sittings after Hilary Term, it appeared that the plaintiff, an excavator, had been given into the custody of a policeman by the defendant, the engineer of the Land Drainage Company, for attempting to defraud the Company of about 2*l*. He was taken to the station-house, but the inspector refused to detain him. The defendant's counsel admitted that there was no legal justification for the act, but tendered evidence to shew that the plaintiff had attempted to commit a fraud on the Company by heaping up earth on certain hillocks in order to increase the measurement of work for which he claimed payment. The learned Judge rejected the evidence on the ground that a distinct substantive offence ought not to be proved against a person who had no notice that it was to be set up against him; and the jury under his direction found a verdict for the plaintiff with 25*l*. damages.

*Hawkins* had obtained a rule for a new trial on the ground that the evidence was improperly rejected, against which

*Woollett* and *Worsley* now shewed caused.—The defendant had no right to go into collateral matters. Thus, in *Downing v. Butcher* (a), the defendant in trespass for false imprisonment was not allowed to cross-examine the plaintiff's witnesses as to the character of the plaintiff, or as to previous charges against him. [*Pollock*, C. B.—Can you say that this evidence was not admissible under the general issue to mitigate the damages? *Chinn v. Morris* (b) is an authority to that effect.] In that case it was proposed to shew that there was reasonable ground to suspect that a felony had been committed; here the defendant proposed to shew that the charge was true. [*Channell*, B.—I have always understood the rule to be that a defendant cannot give the excuse in evidence without pleading it, if it amounts to a justification, but that he can do so if it merely goes in mitigation of damages.] In *Watson v. Christie* (c), where no justification was pleaded, it was held that the jury should give damages to the amount of the injury suffered, without lessening them on account of the circumstances under which it was inflicted. [*Bramwell*, B.—The defendant in that case ought to have pleaded that he moderately corrected the plaintiff: the plaintiff would have been assigned, and the defendant might then have suffered judgment by default. *Channell*, B., referred to *Regina v. Poole* (d).]

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POLLOCK, C. B.—We all think that this evidence ought to have been received. At the trial I thought it very important, but I rejected it on the ground that what was sought to be proved was a distinct substantive crime. However, on the authorities, it appears not to be so.

BRANWELL, B., concurred.

(a) 2 Moo. & Rob. 374.

(b) Ry. & Moo. 424.

(c) 2 B. & P. 224.

(d) 1 Dears. & B. 345.

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CHANNELL, B.—This evidence cannot be said to be irrelevant. The defendant may have been wrong in supposing that the facts constituted an offence, but he ought to have had the opportunity of shewing that the charge was not a pure invention.

Rule absolute.

May 7.

CARTWRIGHT v. FROST.

The Court will not interfere to set aside a Judge's order to change the venue made after issue joined, the defendant being under terms of taking short notice of trial, on the ground that the affidavit on which the order was made was insufficient.

QUAIN had obtained a rule calling on the defendant to shew cause why an order of *Watson, B.*, "that the venue in this cause be changed from the county of Middlesex to the county of Stafford," should not be rescinded.

At the time of the making of the order issue was joined, and the defendant was under terms of taking short notice of trial. The affidavit upon which the order was made stated that the cause of action arose in Staffordshire and not in London; that all the witnesses for the defendant, and to the best of the deponent's belief all the witnesses that could be called for the plaintiff, resided in the county of Stafford; that the defendant had a good defence on the merits, and that the cause would be tried at less expense in Staffordshire than in London. The plaintiff's affidavit in answer stated that the action was brought to recover 65*l.* arrears of salary, and that the only matter in dispute was whether he had been engaged at a salary of 60*l.* or 80*l.* a year; that the only witnesses would be himself and the defendant, and that the application to change the venue was made for the purpose of delay.

*Gray* shewed cause, and urged that the learned Judge having exercised his discretion upon the matter, the Court would not review his decision.

*Quain*, in support of his rule.—The Court will look at all the circumstances of the case. A defendant, who is under terms of taking short notice of trial, cannot apply to change the venue upon the common affidavit. Here the defendant does not shew that he has any witnesses. The affidavit therefore amounts to no more than the common affidavit: *Clulee v. Bradley* (a). [*Channell*, B.—That case only decided that *Cresswell*, J., was right in holding the affidavit to be the common affidavit. It is for the Judge who has the parties before him to say whether a slight addition makes the affidavit sufficient.]

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*MARTIN*, B.—This rule must be discharged. This is not a case for appeal. I believe that I should not have made the order; but my brother *Watson* has done so, and it is a better practice, if the discretion of a Judge has been exercised on a matter of this kind, that his decision should be final than that we should review it.

*BRAMWELL*, B.—Probably I should not have made the order; but I do not know what influenced my brother *Watson's* mind. When a mistake occurs at Chambers it is desirable that it should be set right, if it is worth the expense of doing so. But in a case like the present I think it is better to lay down the rule that the Court will not interfere to set aside the Judge's order.

*CHANNELL*, B.—The matter was clearly one in which the learned Judge had a discretion. A Judge at Chambers does not always decide simply on the affidavits before him: it is by no means unusual for him to act on the admissions of the parties.

Rule discharged (b).

(a) 13 C. B. 604.

(b) See *Begg v. Forbes*, 13 C. B. 614.



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April 17.

TUTON v. SANONER.

Under the 17 & 18 Vict. c. 36, which requires to be filed an affidavit of the description of the occupation of every attesting witness to a bill of sale, it is not a compliance with the statute to describe as "gentleman" a witness, who, though formerly an attorney, was at the time of the attestation acting as an attorney's clerk.

**T**HIS was an interpleader issue to try whether certain goods seized under a writ of fieri facias were, at the time of the delivery of the writ to the sheriff, the property of the plaintiff, the claimant, as against the defendant, the execution creditor.

At the trial before *Martin*, B., at the last Liverpool assizes, the plaintiff gave in evidence a bill of sale to him of the goods in question, dated the 25th June, 1857. It purported to be attested by "William Johnson," following which there was an erasure of the words "solicitor, Liverpool." In the affidavit verifying the bill of sale, the attesting witness was described as "William Johnson, of Liverpool in the county of Lancaster, gentleman." The evidence shewed that Johnson had formerly been an attorney, but for some years past had ceased to practice, and at the time he attested the bill of sale was clerk to an attorney in Liverpool.

It was submitted, on behalf of the defendant, that the bill of sale was void, inasmuch as the requisites of the 17 & 18 Vict. c. 36, had not been complied with. The learned Judge was of that opinion, and a verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter the verdict for him.

*Milward*, in the present Term, moved accordingly (April 17).—The requisites of the 17 & 18 Vict. c. 36, have been sufficiently complied with. By section 1, "Every bill of sale of personal chattels," &c., "shall, together with an affidavit of the time of such bill of sale being made or

given, and a description of the residence and occupation of the person making or giving the same, or in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed" within twenty-one days. The statute does not require a description of the residence and occupation of the attesting witness on the face of the bill of sale; and it may be a question whether such description need be given anywhere, except in cases where the bill of sale is made by a sheriff or other officer. The words "and of every attesting witness to such bill of sale," seem to refer to the words "in case the same shall be made or given by any person *under or in the execution of any process.*" But, assuming that a description of the residence and occupation of the attesting witness is in all cases necessary, here there is a sufficient description in the affidavit (a). [*Martin, B.*—The attesting witness was acting as clerk to an attorney: that was his occupation.] Though he had ceased to practice, his name was on the roll of attornies, and therefore he was properly described as "gentleman." [*Brammell, B.*—In *Allen v. Thompson* (b) this Court held that "gentleman" was not a proper description of a clerk in a government office.] There the party misdescribed was the assignor of the bill of sale, not, as here, the attesting witness. The object of the statute was to give such information that the witness might easily be found, if wanted. Therefore it has been held that an attorney's clerk is properly described as

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(a) With respect to the residence, it was objected that the name of the town was not a sufficient description, but the decision

of the Court rendered this point immaterial.

(b) 1 H. & N. 15.

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residing at the attorney's place of business, though the clerk does not sleep there: *Attenborough v. Thompson* (a), *Blackwell v. England* (b).—He also referred to Arch. Prac. p. 1519, 9th ed.; 1 Black. Com. 406.

*Cur. adv. vult.*

MARTIN, B., now said,—The question in this case was whether the description of the residence and occupation of an attesting witness was sufficient within the 17 & 18 Vict. c. 36, the Act for preventing frauds upon creditors by secret bills of sale. The first point to consider is, whether it is necessary to give a description of the residence and occupation of the attesting witness to a bill of sale. We have carefully read the act of parliament, and are of opinion that there ought to be one. Now, in this case there was no statement in the bill of sale of the residence and occupation, but simply the name "William Johnson;" and therefore, if a description of the residence and occupation is anywhere, it is in the affidavit. The statement in the affidavit is "William Johnson, of Liverpool in the county of Lancaster, gentleman." The evidence was that Johnson had originally been an attorney; that he had for many years ceased to be so, and at the time the bill of sale was executed he was acting as clerk to another attorney. The question is, whether, under those circumstances, there is a sufficient description of the residence and occupation of the attesting witness within the meaning of the act of parliament. We think that question has been already concluded by the case of *Allen v. Thompson* (c), and if the matter were to come before us de novo, we should be of the

(a) 2 H. & N. 559.

(b) Q. B., M. T. 1857, Nov. 20.

(c) 1 H. & N. 15.

same opinion. The witness had an occupation, which ought therefore to have been stated. The definition of "an occupation" is—"the principal business of one's life; vocation; calling; trade; the business which a man follows to procure a living or obtain wealth"(a). The bill of sale was an honest transaction, so that it is to be regretted that the assignee is deprived of his security. On the other hand it would lead to very great inconvenience, if, in order to give effect to an honest transaction, we were to put a wrong construction on the statute. It was argued that the case of *Allen v. Thompson* did not apply, because there the person in respect of whom the description was incorrect was the assignor. But that argument cannot avail, for the same description of residence and occupation is required, and the same words are used with reference both to the assignor and the attesting witness, and to hold it a description in one respect and not in the other would be contrary to all reason and every principle of construction. On consideration, therefore, we think that the judgment in *Allen v. Thompson* is conclusive, and that there has not been a sufficient description of the attesting witness to satisfy the statute. There will therefore be no rule.

Rule refused (b).

(a) Webster's Dict.

(b) See *Sutton v. Bath*, post, Trin. Term.

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April 27.

HALL v. FEATHERSTONE.

Action by indorsee against drawer of a bill of exchange. Plea: that the defendant indorsed the bill and delivered it to W. to get discounted for the defendant and pay him the proceeds: that the bill was never discounted for the defendant, nor was there any consideration for his indorsing it or paying the amount thereof: and W., in fraud of the defendant, indorsed the bill to the plaintiff without consideration. At the trial, the defendant proved that he indorsed the bill in blank and delivered it to W. to get discounted for him, which W. promised to do and bring him the money on the following morning. W. took away the bill, but never returned, and the defendant heard

**D**ECLARATION on a bill of exchange, dated the 22nd December, 1856, and drawn by the defendant upon and accepted by one Richardson, for payment of 65*l.* two months after date, and indorsed by the defendant to one Wallis, and by Wallis to the plaintiff.

Plea.—That the bill was indorsed by the defendant and delivered by him so indorsed to Wallis who received the same from the defendant and always held the same, for a special purpose only, to wit, that he might get it discounted for the defendant and pay him over the proceeds, which purpose wholly failed and was never carried out, and the bill was never discounted for the defendant, nor was there ever any value or consideration for the defendant's indorsing the bill or for his paying any part of the amount thereof. And Wallis afterwards, in fraud of the defendant and without his consent and in violation of the said purpose, indorsed the bill to the plaintiff. And that there never was any value or consideration for the indorsement of the bill to the plaintiff or for his holding the same. And the plaintiff had notice of the premises before and when the bill was first indorsed to him and took it from Wallis with such notice. And the bill was overdue according to its tenor before and when it was first indorsed to the plaintiff.—Issue thereon.

At the trial, before *Pollock*, C. B., at the Middlesex Sittings after last Michaelmas Term, the defendant, in support of his plea, proved that on the night of the 22nd

no more of it until payment was demanded by the plaintiff's attorney.—*Held* sufficient evidence of illegality to cast on the plaintiff the onus of proving consideration.

of December, 1856, one Wallis was at his house, when he asked Wallis to get the bill in question discounted. Wallis promised to do so, and bring him the money on the following morning. The defendant then indorsed the bill in blank and delivered it to Wallis, who took it away with him. Wallis never returned; and the defendant heard no more of the bill until it became due, when the plaintiff's attorney applied to him for payment. The defendant stated that Wallis had given him a memorandum for the bill, and that he had left it on the table whilst Wallis was at his house, and, having quitted the room for a short time, he could not afterwards find it.

The plaintiff's counsel submitted that there was no case to call on the plaintiff to prove consideration. The learned Judge was of that opinion, but suggested that, in order to prevent any future question, the plaintiff should prove the consideration. The plaintiff then proved that he had discounted the bill for Wallis, who represented that it belonged to him. The defendant's counsel then contended that upon the whole case there was some evidence for the jury, and that he was entitled to sum up for the defendant. The learned Judge ruled that there was no case for the jury, and that the defendant's counsel was not entitled to sum up; and his Lordship directed a verdict for the plaintiff.

*Montagu Chambers*, in the following Term, obtained a rule nisi for a new trial on the ground of misdirection; against which

*Edwin James* (*Hawkins* with him) shewed cause.—The evidence given by the defendant was not sufficient to cast on the plaintiff the onus of proving that he gave value for the bill. [*Bramwell*, B., referred to *Bailey v. Bidwell* (a).] No doubt, where there is fraud in the transfer, the holder

(a) 13 M. & W. 73.

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of the bill must prove consideration: Roscoe on Evidence, 278, 9th ed. But here there was no evidence of fraud. The defendant delivered the bill to Wallis to get it discounted, and he failed to hand over the proceeds to the defendant. [*Channell, B.*—In *Fitch v. Jones (a)* it was held that proof of illegality or fraud in a previous holder raises a presumption that the plaintiff is agent for that holder without value, and, consequently, calls on the plaintiff to prove value; but that the presumption does not arise where the previous holder merely held without consideration.] Here, there was no illegality but merely a failure of consideration: the person who was selected by the defendant as his agent violated his trust. [*Martin, B.*, referred to *Berry v. Alderman (b)*.]

*Montagu Chambers*, in support of the rule.—The defendant proved such circumstances of suspicion as to cast on the plaintiff the onus of proving consideration. In *Edmunds v. Groves (c)*, Lord *Abinger* said that “the very circumstance that it was improperly obtained may cast such suspicion on the title to the note, that unless the plaintiff rebuts any inference to be drawn from his possible connection with the party who so obtained it, by proving that he gave value, the jury may infer against him that he was so connected.” *Smith v. Braine (d)* is an express authority that there was in this case evidence which ought to have been submitted to the jury.—He was then stopped by the Court.

**POLLOCK, C. B.**—We are all of opinion that the rule must be absolute. Later decisions have laid down this,—that if there are any circumstances in the nature of fraud or ille-

(a) 5 E. & B. 238.

(b) 14 C. B. 95.

(c) 2 M. & W. 642.

(d) 16 Q. B. 244.

gality which can be left to the jury, proof of those circumstances by the defendant will cast on the plaintiff the onus of shewing that he gave value for the bill. Here, the value disclosed was a question which in strictness ought to have been submitted to the jury. At the trial, I thought that the defendant's evidence was not sufficient to call on the plaintiff to prove consideration, but the case of *Smith v. Braine* (a) establishes this proposition, that if there are any circumstances from which the jury may infer that the plaintiff has not given value for the bill, and he offers no evidence in reply, the facts should be submitted to the jury in support of the plea. There will therefore be a new trial.

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MARTIN, B.—I think that, according to the authorities, there was at the close of the defendant's case evidence for the jury in support of the plea. *Smith v. Braine* is conclusive on that point. I adhere to what I said in *Harvey v. Towers* (b). The authorities have established a principle which is contrary to the general rule by which a defendant is bound to prove *all* the facts necessary to constitute a defence. It may perhaps be justified on the ground of convenience, as throwing difficulties in the way of recovering on bills tainted with fraud.

BRAMWELL, B.—I am also of opinion that the rule ought to be absolute. The cases have established that, if there be fraud or illegality in the inception of a bill, or in the circumstances under which it was taken by the person who indorsed it to the plaintiff, he must prove consideration. That is established beyond controversy. The question, therefore, is, whether there was fraud or illegality in the inception of this bill or in the course of the intermediate

(a) 16 Q. B. 244.

(b) 6 Exch. 656.



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indorsement—what is the value of the evidence is immaterial. I think there was stronger evidence than in the case of *Smith v. Braine* (a); for there it was not clear that the intermediate indorser intended to appropriate the money. However, the principle of that case governs this.

CHANNELL, B.—I am also of opinion that the rule ought to be absolute. The view taken at the trial was in accordance with the earlier decisions, which are not consistent with *Smith v. Braine* and *Mather v. Lord Maidstone* (b).

Rule absolute.

(a) 16 Q. B. 244.

(b) 1 C. B., N. S. 273.

April 29.

WINTLE, judgment creditor, v. WILLIAMS, judgment debtor,  
SMITH, garnishee.

Where, in a garnishment proceeding under the Common Law Procedure Act, 1854, the garnishee disputes his liability, and the judgment creditor declines to proceed by writ under the 64th section, the garnishee is entitled to have the attachment order dismissed with costs.

ON the 27th March the plaintiff recovered judgment against the defendant for 15*l.* debt and costs. On the 30th March an order was made under the 61st section of the Common Law Procedure Act, 1854, "that all debts owing or accruing from one Smith, the garnishee, to the judgment debtor be attached to answer the judgment debt, and that the garnishee appear before a Judge on a day named, to shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor." On the 13th April cause was shewn before *Pollock*, C. B., who ordered that the above order be dismissed with costs, on the ground that the garnishee held the money of the judgment debtor in trust to divide it amongst his creditors.

*Gray*, in the present term, obtained a rule calling on the garnishee to shew cause why the order of *Pollock*, C. B.,

should not be rescinded; and why the garnishee should not pay into Court an amount equal to the judgment debt; and why, in default thereof, the plaintiff should not be at liberty to issue execution against him, pursuant to the 63rd section of the Common Law Procedure Act, 1854, or why the plaintiff should not be at liberty to proceed against the garnishee pursuant to the 64th section of that Act.

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*C. Pollock* now shewed cause upon further affidavits, clearly shewing that the garnishee held the money of the judgment debtor in trust for his creditors.

*Gray, contra.*—The plaintiff abandons that part of the rule which asks for leave to proceed against the garnishee, and only desires that so much of the garnishment order as attaches the debt may not be dismissed. If that order had not called on the garnishee to shew cause why he should not pay the judgment creditor, the attachment would have been in force and proceedings might at any time have been taken under it. [*Bramwell, B.*—By the 64th section of the Common Law Procedure Act, 1854, “If the garnishee disputes his liability, the Judge, instead of making an order that execution shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to shew cause why there should not be execution against him for the alleged debt,” &c. That section does not say what is to take place if the garnishee disputes his liability and the judgment creditor is unwilling to proceed against him; but it could never have been intended that the attachment should remain in force until the judgment creditor thought fit to proceed.] The plaintiff is entitled to be in the same situa-

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tion as if he had not by the attachment order called on the garnishee for payment.

POLLOCK, C. B.—The rule must be discharged. Where the garnishee disputes his liability, and the judgment creditor declines to proceed against him by writ of revivor, the attachment order ought to be dismissed with costs. The judgment creditor must either go on or retire and pay the costs. If he does not demand the writ, it is because he he knows he is in the wrong.

MARTIN, B.—I am of the same opinion.

BRAMWELL, B.—It seems to me that where the judgment creditor calls on the garnishee to appear before a Judge, and the garnishee appears and disputes his liability, and the judgment creditor will not proceed against him, the Judge is warranted in putting an end to the attachment. It would be a great hardship on the garnishee if the order were allowed to stand. Therefore, in this case, I think that the learned Judge was right in setting aside the order.

CHANNELL, B.—I am also of opinion that the rule must be discharged. The course of proceeding was this:—The Judge made an order of a two-fold character : First, he ordered that all debts owing or accruing from the garnishee to the judgment debtor should be attached to answer the judgment debt. But that order could not be enforced until the garnishee was summoned before a Judge; therefore the Judge made another order that the garnishee should appear on a given day before him to shew cause why he should not pay to the judgment creditor the debt due from himself to the judgment debtor. If a garnishee does not pay the money into

Court, and does not dispute the debt, or does not appear upon the summons, the Judge may order execution to issue without any previous writ or process; but if the garnishee disputes his liability, the judgment creditor has the option of issuing a writ against him. Here, the judgment creditor declined to do so; and, therefore, I think that the learned Judge was right in rescinding the attachment order. The judgment creditor in effect abandoned his right of obtaining payment from the garnishee.

Rule discharged, with costs.

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WHEELHOUSE v. LADBROOKE.

April 27.

THIS was an action on two joint and several bonds, each in the penal sum of 40,000*l.* and conditioned for payment of 20,000*l.* and interest at the expiration of six months after notice in writing requiring payment; and whilst the 20,000*l.* remained unpaid, for payment of 5 per cent. interest on the usual quarter days. Default was made in the payment of the quarter's interest due the 25th March (as it was alleged through inadvertence), and on the 8th of April the plaintiff gave notice in writing requiring payment of the principal, and on the following day commenced the present and four other actions against the other obligors.

A joint and several bond was conditioned for payment of the principal money after six months notice, and in the mean time for payment of interest on the usual quarter days. Default having been made in payment of one quarter's interest (as it was said through inadvertence), the obligee gave notice to pay the principal, and the next day brought actions on the bond against the several

*Maude* now moved to stay proceedings on payment of the interest due and costs; or to stay proceedings until the expiration of the notice requiring payment.—The Court may give relief in the exercise of its equitable jurisdiction.

obligors.—*Held*, that the Court had no power to stay the proceedings on payment of the interest due and costs.

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In *Van Sandau v.* — *one, &c. (a)*, the Court refused to interfere. [*Martin, B.*—The case of *Darby v. Wilkins (b)* is an express authority against the application. There a bond was conditioned for payment of a certain sum by instalments, and, the first instalment not being paid, the bond was put in suit. Before judgment, the defendant moved to bring in the amount of that instalment with interest and costs. The plaintiff was willing to accept it, but insisted that as the bond was forfeited he had a right to sign judgment, and submitted to be bound by the rule not to take out execution for more than was due.] That was an application under the 4 Anne, c. 16, s. 13, which enables a defendant at any time, pending an action upon a bond with a penalty, to bring into Court the principal, interest, and costs, in full satisfaction and discharge of the bond; and the Court there said:—"That plainly relates to the case of bringing in all the money reserved by the condition, because it says the bond shall be absolutely discharged. However, within the equity of the statute, it has been allowed to bring in the money due on the instalments." [*Channell, B.*—The bond having been forfeited at law, the plaintiff has a right to judgment for the penalty as a security for his debt; while the 8 & 9 Wm. 3, c. 11, prevents him issuing execution for more than is actually due.] The plaintiff will be in no worse situation than he would have been if the instalment had been paid on the day it was due.

POLLOCK, C. B.—There will be no rule. We have no jurisdiction to interfere.

MARTIN, B.—We cannot deprive a party of his legal right.

(a) 1 B. & Ald. 214.

(b) 2 Str. 967.

BRAMWELL, B.—Application to the equitable jurisdiction of a Court of law is where the Court is asked to do in a summary way something which would otherwise have been done in the ordinary way; but here we are asked to deprive the plaintiff of his right to enforce payment of his debt.

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CHANNELL, B., concurred.

Rule refused.

HOGGE v. BURGESS.

May 1.

THIS was an action to recover 92*l.* 1*l.* 7*d.*, the balance of an account for beer supplied by the plaintiff to the defendant. After the issuing of the writ the cause was referred by order of a Judge, under the 3rd section of the Common Law Procedure Act, 1854, to the judge of the County Court of Bedfordshire, holden at Ampthill. At the hearing before the arbitrator the defendant set up the Statute of Limitations, and the plaintiff relied upon the account being a running account. The arbitrator certified that the plaintiff was entitled to recover the amount claimed.

The rules of law, as to setting aside awards under ordinary references, apply to compulsory references under The Common Law Procedure Act, 1854, and the 8th section of that Act only enables the Court to remit the matters referred to the arbitrator in cases where they would otherwise set aside the award.

*W. M. Cooke* had obtained a rule calling on the plaintiff to shew cause why the certificate should not be set aside, on the ground that the arbitrator decided the matters referred to him contrary to law and fact; or why the matters should not be referred back to the arbitrator. The affidavit in support of the application set out the account, and stated that the arbitrator's decision was founded on a fact stated by himself, that this was a running account, and that therefore the Statute of Limitations did not apply.

Therefore where, on a compulsory reference under that Act, the defendant set up the Statute of Limitations, and the plaintiff relied on a running account, and the arbitrator

certified that he was entitled to recover, the Court refused to remit the matter to the arbitrator on an affidavit that he was mistaken as to the law and fact.

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*H. Lloyd* shewed cause.—In ordinary references the decision of the arbitrator is final; and if the award is good on the face of it, the Court will not set it aside because the arbitrator has made a mistake in law or in fact. The Court will not remit the matters referred to the arbitrator except in cases where they would otherwise set aside the award. The same rule prevails in references under the compulsory clauses of the Common Law Procedure Act, 1854. The 3rd section enables the Court or a Judge, upon the application of either party, to refer matters of mere account to an arbitrator appointed by the parties, or to an officer of the Court, or, in country causes, to the judge of any County Court. [*Martin*, B.—The 7th section expressly says that the proceedings upon any such arbitration shall be subject to the same rules as to setting aside the award, as upon a reference made by consent under a rule of Court or Judge's order.]

The Court then called on

*W. M. Cooke* to support the rule.—There is a difference between references by consent and references under the compulsory clauses of the Common Law Procedure Act, 1854. In *Brown v. Hellaby* (a), which was a reference under that Act, the Court remitted the award to the arbitrator in order that he might find the issues specifically. [*Watson*, B.—In that case cross actions were referred by separate orders of reference, and the question was whether the arbitrator ought not to have made two awards.] The case was again before the Court, and it would seem from the report of it (b) that the rule with respect to ordinary

(a) 1 H. & N. 729.

(b) 26 L. J., Exch. 217. Not reported in H. & N. because there was no decision on the sub-

ject: the Court having refused to entertain the application to set aside the award, because the amount in dispute was so trivial.

references does not apply to compulsory references under the Common Law Procedure Act, 1854. In Holland's Notes to the Common Law Procedure Act, 1854, p. 213, the editor refers to the case of *Fuller v. Fenwick (a)*, where there was a clause in the order of reference empowering the Court, in case of a motion to set aside the award, to remit the matters thereby referred, and the Court refused to refer back an award for an objection in point of law not apparent on the face of it; but a doubt is expressed "whether that decision will still govern the Court, as the power of remitting is now given by the legislature, not by the parties to the reference; and the power is in more general terms than the powers generally found in orders of reference." The 7th section of the Common Law Procedure Act, 1854, does not apply to this case. By that section "the proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby or by the submission or document authorizing the reference, be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the Court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of Court or Judge's order." That relates to an application to set aside the award, not to remit the matter referred to the arbitrator. Then the 8th section provides, that "in any case where reference shall be made to arbitration as aforesaid, the Court or a Judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said Court or Judge may seem proper." The power to remit is not limited to cases where the Court

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(a) 3 C. B. 706.



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would otherwise set aside the award, for the words of the enactment are “*in any case.*” There is reason for the distinction, since, in references under the Act, the parties are deprived of their right of trial by jury, and the arbitrator is an officer of the Court to whose appointment they have not assented. Even in an ordinary reference the Court will set aside an award for a mistake in law or fact, though not apparent on the face of the award, if the arbitrator’s reasons for the decision appear by some other authentic document: *Kent v. Elstob* (a). So, where the arbitrator has committed a mistake so gross as to amount to misconduct, the Court will interfere though the objection does not appear on the face of the award: *In re Hall v. Hinds* (b). In *Phillips v. Evans* (c), where the arbitrator omitted by mistake a sum admitted to be due to the plaintiff, but the error did not appear on the face of the award nor did the arbitrator make any affidavit, this Court refused to interfere. The 8th section was intended to alter that state of the law, by enabling the Court to remit the matters to the arbitrator in all cases of compulsory reference, where it appeared to the satisfaction of the Court that he was mistaken in point of law or fact.

MARTIN, B.—The rule must be discharged. Upon the true construction of the Act, this case is provided for by the 7th section. According to the old rule, the decision of an arbitrator, both upon the law and facts, was conclusive. That rule was broken into by the Court of King’s Bench in the case of *Kent v. Elstob*, and on another occasion by the Court of Common Pleas in the case of *In re Hall and Hinds*. The latter case was cited before this Court in *Phillips v. Evans*, where the present Mr. Justice Williams argued in

(a) 3 East, 18.

(b) 2 Man. &amp; G. 847.

(c) 12 M. &amp; W. 309.

support of the rule and urged every topic which could be submitted to the Court, but they refused to interfere; and *Parke*, B., in concluding his judgment, said:—"Although we may possibly do some injustice in particular cases, I think it better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door to inquire into the merits, or we shall have to do so in almost every case." *Alderson*, B., also said:—"It is safer to abide by the general rule of not allowing awards to be set aside for mistakes." That was clearly the old rule, and we have now to deal with an act of parliament operating on these proceedings by compulsory reference. It is well known that up to a certain period there was no power to send back an award to an arbitrator. The clause for that purpose was first introduced by the late Mr. *Vaughan Richards*, and it enabled the Court to remit the matters referred to the arbitrator instead of setting aside the award. The legislature, acting on that state of things, by the 3rd section of the Common Law Procedure Act, 1854, enabled the Court or a Judge to refer matters of mere account, in country causes, to the judges of the County Courts, who are proper persons to decide upon both the law and facts. Then comes the 7th section, which refers to an arbitration in pursuance of an order of the Court or a Judge under the 3rd section, and which says that the proceedings upon any such arbitration "shall be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the Court," &c., "enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of Court or a Judge's order." So that there is an express enactment that the power of the arbitrator and of the Court as to setting aside the award shall be the same as upon a reference by consent. I cannot conceive a stronger legislative enactment that the

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Court shall have no further power to set aside an award under that Act than on a reference by consent. Mr. *Cooke* says that is altered by the 8th section; but we must look at the intention of the legislature, and we find a distinct enactment that the power of the Court shall be the same as on a reference by consent, and, applying that to this case, it means that the Court shall not have power to set aside an award for a mistake of law or fact. The 8th section says:—"In any case where reference shall be made to arbitration as aforesaid, the Court or a Judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said Court or Judge may seem proper." It seems to me, that is nothing more than enacting that the clause introduced by Mr. *Richards* shall apply to all orders of reference made under the 3rd section, and that it does not alter the distinct enactment of the 7th section. *Brown v. Hellaby*, reported in 26 Law Journal, was not a judicial decision. It is true that arbitrators may commit error, but we must contrast the one evil with the other, and the evil of having innumerable applications to set aside awards would far exceed the evil of an occasional wrong decision. For these reasons I think that the Court has no power to interfere.

WATSON, B.—I am of the same opinion. This is a motion to set aside the certificate of an arbitrator, on the ground that he was mistaken in point of law and fact. The law as regards awards not under this Act is clear. Where an arbitrator professes to decide according to law, but does not do so, if the mistake appears on the face of the award, or is disclosed by some contemporaneous writing, the Court will set aside the award. So, also, with respect to

a mistake in fact. To that extent the law has gone, but no further. An attempt was made to carry it further in the case of *Phillips v. Evans* (a). There it appeared by the affidavit of one of the parties that the arbitrator had made a mistake, and, on its being pointed out to him, he admitted it. But the Court refused to set aside the award on that ground, in my opinion correctly, because if once an inquiry into the merits were allowed there would be no end of it. However, as I before observed, if the mistake appears on the face of the award, or is disclosed by some contemporaneous writing, the Court will act upon it. That being the general law, the only question is, whether there is any difference with respect to awards under the compulsory clauses of the Common Law Procedure Act, 1854. That Act provides for two cases, viz., a reference before trial and a reference upon the trial. The provisions are most beneficial, for a number of causes were entered at *Nisi Prius* which, being matters of mere account, it was impossible to try so as to do justice between the parties. Section 3 relates to references before trial; section 6 to references at *Nisi Prius*. Then, by section 7, "The proceedings upon any such arbitration," that is upon a reference either before trial or at *Nisi Prius*, "shall be subject to the same rules and enactments as to the power of the Court, the enforcing or setting aside the award, as upon a reference made by consent under a rule of Court or Judge's order." Therefore the legislature has not left the matter in doubt, but has clearly expressed its intention that these compulsory references should be governed by the rules of law applicable to ordinary references. Then comes the clause enabling the Court or a Judge to remit the matters referred to the re-consideration of the arbitrator; but that does not apply to this case. The Court or a Judge can only remit to the arbitrator in cases where they

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(a) 12 M. &amp; W. 309.

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would otherwise set aside the award. For these reasons I am of opinion that the rule ought to be discharged.

CHANWELL, B.—I am also of opinion that the rule ought to be discharged. It asks to set aside this certificate, or to refer back the matters to the arbitrator; and the application is founded on a supposed distinction between references under the compulsory clauses of the Common Law Procedure Act, 1854, and references under a rule of Court or Judge's order. But in my opinion there is none. The 8th section gives the Court or a Judge no more power than they would have under an ordinary reference; that is, they may remit in compulsory references where, in references made by consent, they might have sent back the matters to the arbitrator. The case of *In re Hall and Hinds* went to the utmost extent. There the arbitrator, instead of adding two sums together and giving the aggregate amount to the party as he meant to do, deducted the one sum from the other and gave it to the other party, and the Court considered that so gross a mistake as to amount to misconduct. That case, however, was under the consideration of this Court in *Phillips v. Evans*, but they did not act upon it.

Rule discharged.

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*Judge's remarks in Ex. Ch.  
4 H. & N. 815.  
April 30.*

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**T**HE declaration stated, that after the passing of a certain act of parliament made and passed in a session of parliament held in the 6th and 7th years of the reign of her present Majesty, intituled "An Act to consolidate and amend the laws relating to the copyright of designs for ornamenting articles of manufacture," the plaintiffs, before and at the time of the registration of the design as next hereinafter mentioned, and thence until the commencement of this suit, were, within the true intent and meaning and protection of the said act of parliament, the proprietors of a new and original design, or pattern, for the purpose of being applied by weaving the same to, in, or upon woven fabrics, for the pattern and ornamenting thereof; which said design or pattern at the time of said registration had not been previously published: and thereupon heretofore, to wit on &c., the plaintiffs duly registered the said design or pattern, in the name of themselves as the proprietors thereof, according to the statute in that case made and provided.—Averments: that within the term of one year, and before the commencement of this suit, to wit on &c., the said design or pattern was first published, and that from the time of the said publication until and at the time of the committing of the grievances by the defendant as hereinafter mentioned, every article of manufacture to which the said design or pattern of the plaintiffs had been applied, according to the design or pattern, had thereon the word "Registered," with the date of the said registration thereof.—Breach: that the defendant, well knowing the premises, after the said registration and within the term of one year, and before the commencement of this suit, to wit on &c., and on divers

The plaintiffs registered, under the 5 & 6 Vict. c. 100, a design for ornamenting woven fabrics. The design was applied to a fabric woven in cells, called the honeycomb pattern, and it consisted of a combination of the large and small honeycomb, so as to form a large honeycomb stripe on a small honeycomb ground. The large honeycomb was not new and the small honeycomb was not new, but they had never been used in combination before the plaintiffs registered their design. Other fabrics had been woven with a similar combination of a large and small pattern. In an action against the defendant for infringing the plaintiffs' copyright.—*Held*, that the design was not "new and original" within the meaning of the 5 & 6 Vict. c. 100.

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other days and times afterwards, wrongfully and unjustly and without the licence or consent in writing of the plaintiffs, or either of them, applied the said design or pattern to a certain substance partly artificial and partly natural, to wit, to woven fabrics, in imitation of the said design or pattern, contrary to the form of the statute, &c.

Plea (inter alia): that the said design or pattern was not new and original as alleged.—Issue thereon.

At the trial before *Bramoell*, B., at the London sittings after last Michaelmas Term, it appeared that in March 1857 the plaintiffs registered (under the Designs Copyright Act, 5 & 6 Vict. c. 100,) a design for ornamenting woven fabrics. The design was applied to a fabric woven in cells, called the honeycomb or porcupine pattern, and it consisted of a combination of the large honeycomb and small honeycomb, so as to form a large honeycomb stripe on a small honeycomb ground. The large honeycomb was not new and the small honeycomb was not new, but they had never been used in combination before the plaintiffs registered their design. There was however another fabric, called hopsack, in which the large and small hopsack pattern had been used in combination similar to the plaintiffs, and the same combination had also been used in large and small checks. The defendant had woven fabrics with the same combination of the large and small honeycomb as the plaintiffs.

It was submitted on behalf of the defendant that this was not a new and original design within the meaning of the 5 & 6 Vict. c. 100. By arrangement between the counsel that question was left to the jury, and they found it in the affirmative; whereupon a verdict was entered for the plaintiffs, leave being reserved to the defendant to move to enter the verdict for him.

*Manisty*, in the following term, obtained a rule nisi to enter the verdict for the defendant on the above plea, on

the ground that the plaintiffs' alleged design was not a new and original design within the meaning of the 5 & 6 Vict. c. 100, against which

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*Montague Smith* and *Brewer* shewed cause (April 29).— This is a “new and original design” within the meaning of the 5 & 6 Vict. c. 100. The 3rd section (a) gives the proprietor of every such design the sole right to apply it to any articles of manufacture for certain periods, varying according to the description of manufacture, which is enumerated in classes. This case falls within the 12th class, which is, “woven fabrics not comprised in any preceding class,” and the protection is for twelve months. [*Pollock*, C. B.—The large honeycomb in itself is not new, and the small honeycomb in itself is not new, but a striped pattern is made by the combination of them. Then, has that sort of combination ever been performed upon any other material? If it

(a) “And with regard to any new and original design (except for sculpture and other things within the provisions of the several Acts mentioned in the Schedule (C.) to this Act annexed), whether such design be applicable to the ornamenting of any article of manufacture, or of any substance, artificial or natural, or partly artificial and partly natural; and that whether such design be so applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes; and by whatever means such design may be so applicable, whether by printing or by painting, or by embroidery, or by weaving, or by sewing, or by modelling, or by casting, or by

embossing, or by engraving, or by staining, or by any other means whatsoever, manual, mechanical or chemical, separate or combined: Be it enacted, that the proprietor of every such design not previously published either within the United Kingdom of Great Britain and Ireland or elsewhere, shall have the sole right to apply the same to any articles of manufacture or to any such substances as aforesaid, provided the same be done within the United Kingdom of Great Britain and Ireland, for the respective terms hereinafter mentioned, such respective terms to be computed from the time of such design being registered according to this Act,” &c.



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has, the plaintiff is in this condition—a person makes a pattern of blue, white, and red, in stripes; then another puts green, yellow, and white: is the latter an infringement of the former? Can a design be said to be new, each part being old, and the mode of dealing with the two parts in combination having been adopted with respect to other substances?] This is a new description of cloth: there are larger and deeper cells than before made, and the effect of the combination of the large and small cells is to produce a stripe of a new design. [*Martin*, B.—Suppose a stripe had never been applied to black cloth, but only to blue or grey, could a person register a design for applying it to black? or suppose that for the first time he applied a black stripe to blue cloth or a blue stripe to grey?] In those cases no new effect would be produced except by the colour; and under this statute there cannot be “a design” by colour only. [*Pollock*, C. B.—If a person designed a paper for a room with a purple ground and a certain spot or figure of a red colour, another person could not register a design for the same pattern but of a different colour. *Bramwell*, B.—That appears to be so from these words in the 3rd section:—“By whatever means such design may be so applicable, whether by printing, or by painting, or by embroidery, or by weaving, or by sewing, or by casting, or by embossing, or by engraving, or by staining.”] This combination is “a design” within the Act. It is new and original because it has never been done before, and this precise effect arising from the combination of the large and small cells has never been produced before. *Regina v. Firmin* (a) is an authority that a combination of known things may produce a new and original design. There the defendant

(a) Q. B., M. T. Nov. 8, 1851.  
 No report of this case can be  
 found except in a publication

called “The Justice of the Peace,”  
 (vol. 15, p. 740), from which the  
 above statement is taken.

was convicted before a magistrate, under 5 & 6 Vict. c. 100, for having, after notice from the proprietor of a new and original design for a regulation button, and without his consent, sold a button which was a fraudulent imitation of it. On application for a certiorari to remove the conviction into the Court of Queen's Bench for the purpose of quashing it, a case was stated by order of the Judge, from which it appeared that the alleged original design consisted of the royal arms surrounded by a garter, the garter bearing the inscription "The Royal Mail Steam Packet Company." The Court held, that as a new and original combination might be the result of simultaneously applying two old and known designs to the ornamenting of a button, the application to quash the conviction ought to be discharged. *Coleridge*, J., there said,—"Suppose a jockey on one button, a horse on a second, and a third button having such a jockey as in the first button mounted on such a horse as in the second. There would be simultaneous application of two old designs, and the result would be a new combination. So, here, a scroll with writing therein is an old ornament of a button; so is the royal arms; is not the union of the two, by causing the scroll to enclose the two, a new combination?" It is true that a combination similar to that in this case had been applied to a fabric called "hopsack;" but "hopsack" is not a cellular cloth.—They also referred to the 6 & 7 Vict. c. 65, and *Regina v. Bessell* (a).

*Manisty*, in support of the rule.—There is no novelty or originality in the combination of the large and small honeycomb pattern. The protection afforded by these statutes was intended as a reward for some meritorious invention. The 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65, have different objects: the former relates to ornament, the latter to utility,

(a)'16 Q. B. 810.

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but both of them only protect new and original designs. The discovery of the large or small honeycomb pattern might be a novelty; but there is no novelty in combining them in the same way as was formerly done with the hopsack and with checks. If the 5 & 6 Vict. c. 100, is to be construed as suggested, there was no occasion to introduce the words "new and original," the words "any design" would have been sufficient. This is simply a design, there is nothing new or original in it. [*Bramwell*, B.—The difficulty I have is this, that there is nothing like invention here. A person who is blindfolded may take two pieces of cloth and put them together in a certain form; but without designing it is difficult to say what is the design. Suppose, instead of this particular invention, there had been a honeycomb ground with a plain cloth stripe, would that be a design?] It would not, because it was known to everybody that it could be done. [*Pollock*, C. B.—Your argument is this:—There have been formerly two fabrics, which may be represented by horizontal and perpendicular lines, one of them smaller than the other; and formerly there were other fabrics represented by diagonal lines large and small. Manufacture D. is not new, and manufacture C. is not new; and the mode of putting them together has been done with fabrics A. and B.; then what is there new in C. and D.? *Bramwell*, B.—Suppose a person wove cloth with a large pattern for the ground and a small pattern for the stripe, would that be a new pattern?] That is different from this case, which is the mere putting together in a known way two known things of the same sort. [*Pollock*, C. B.—It is as if a person registered a new and original design for making shirts in linen, and another person registered the application of the same thing to making shirts in calico.] In *Brook v. Aston* (a) there was a patent for an improvement in a machine for finishing yarns of wool and hair, and

(a) Q. B. M. T. 1857.

the same process was applied to the finishing of cotton or linen yarns, but that was held not to be the subject of a patent.

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*Cur. adv. vult.*

POLLOCK, C. B., now said,—In this case the question is, whether that which the plaintiff alleged to be a new and original design is so. We are of opinion that it is not. It turning out, on the facts, that the two materials used by the plaintiffs were neither of them new, but both of them old, and that the mode of dealing with them was not new, but also old, the supposed new and original design comes to this—that old materials are used in an old way, and we think that does not make a new design. The rule must therefore be absolute.

MARTIN, B.—One of the explanations in the dictionary of the word design is, “project,” “an idea,” and it seems to me that such is the sense in which the word “design” is used in this act of parliament. Here the “idea” was not new, but there was merely the applying an old idea to a different kind of cloth. This is a mere combination in a manner well known. There must be something like projecting or forming an original idea to make a design within this act of parliament.

BRAMWELL, B.—I think the question is one of some nicety, but in my opinion the point to be resolved is whether this is a new and original design, or a variety of an old design. I think that it is a variety of an old design.

CHANNELL, B., concurred.

Rule absolute.

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May 6.

RUCK v. WILLIAMS, Clerk, &amp;c.

The plaintiff was the owner of premises in Cheltenham which were drained by a sewer which emptied itself into the river Chelt. At the mouth of this sewer there was a flap or penstock which prevented any water of the river from flowing up the sewer. In the year 1852 an act of parliament passed for improving the town of Cheltenham (15 Vict. c. 1.), and which directed the Commissioners appointed under it to make new sewers.

Accordingly the Commissioners constructed a new sewer which passed under the river Chelt near the plaintiff's premises, and removed the flap from the mouth of the old sewer and connected it with the new sewer. The plaintiff's premises were twelve feet below the summit level of the new sewer. In July 1855 there was a heavy storm of rain, by which the river Chelt was flooded, and in consequence the new sewer burst and the water of the river flowed into it. The Commissioners erected a tank round the hole, but before the repair of the sewer was completed another extraordinary flood took place, by which the tank was washed away and the water of the river rushed into the sewer and forced the sewage matter and water into the plaintiff's premises, thereby causing great damage. The 15 Vict. c. 1., incorporates the 144th section of the Public Health Act, 1844, which provides "that full compensation shall be made out of the general or special district rates to be levied under this Act, to all persons sustaining any damage by reason of the exercise of any of the powers of this Act."—*Held*, first, that the Commissioners were liable to an action for negligence, and were entitled to reimburse themselves out of the rates: Secondly, that they were guilty of negligence in not putting up a flap or penstock at the mouth of the old sewer.

THE declaration stated, that the plaintiff sued the defendant, clerk for the time being to the Cheltenham Improvement Commissioners, within the true intent and meaning of "The Cheltenham Improvement Act, 1852:" For that, before and at the time of the committing of the grievances, &c., the plaintiff was possessed of certain messuages and tenements, called respectively Montpellier Baths and No. 4, Bath Place, situate and being within the boundaries of the borough and parish of Cheltenham; and the said Commissioners had, within the boundaries of the borough and parish of Cheltenham, and the limits prescribed by the Act for that purpose, and under the provisions and in exercise of the powers of the said Act, constructed a certain sewer which passed under the river Chelt, near the said several messuages and premises of the plaintiff, and kept and continued the said sewer so constructed and situated as aforesaid, and had the care, controul and management thereof as such Commissioners, and which said sewer was and still is vested in them as such Commissioners under the said Act. And the plaintiff further saith, that the said sewer was constructed by the Commissioners as aforesaid in a bad, defective and improper manner, and, after it was so constructed, it was kept and continued and

allowed by them to remain and be in a defective, unsafe and improper condition and in want of necessary support and repairs; and that there was a want of due and proper care on the part of the said Commissioners in and about the premises and in constructing, repairing, and seeing to and providing for the state and condition of the said sewer works in reference thereto. Whereby, and by reason of the construction of the said sewer as aforesaid, and the said several premises hereinbefore mentioned as to the defective, bad and improper construction of the said sewer, and as to the keeping, continuing and allowing it to remain and be in a defective, unsafe and improper condition and in want of necessary support and repairs, and as to the want of due and proper care on the part of the Commissioners in the constructing, repairing, and seeing to and providing for the state and condition of the said sewer, divers large quantities of water, sewage matter and filth flowed from the said sewer unto the said messuages and premises of the plaintiff, causing great damage thereto and to certain household and bath furniture of the plaintiff therein, &c.

Plea.—Not guilty (by stat. 11 & 12 Vict. c. 63, s. 139, and 15 Vict. c. L, s. 20).—Issue thereon.

At the trial, before *Martin*, B., at the Gloucestershire Summer Assizes, 1857, the following facts appeared.—The plaintiff was the occupier of the Montpellier Baths, at Cheltenham, and owner of a house, No. 4, Bath Place. For a considerable time there had been a sewer called the Montpellier Baths Sewer, which emptied itself into the river Chelt, and the plaintiff's premises were drained by means of a private drain communicating with this sewer. At the mouth of the sewer there was a swing flap or penstock, which prevented any water of the river from flowing up the sewer to the plaintiff's premises. In

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the year 1852, the Commissioners obtained an act of parliament, (15 Vict. c. 1.), which directed them to make new sewers. Accordingly, they contracted with certain persons to construct a sewer, called the Chelt Sewer, which passed under the river Chelt, near the plaintiff's premises, and considerably deeper than the Montpellier Baths Sewer. The Commissioners removed the flap from the mouth of this sewer and connected it with the Chelt Sewer; but they did not replace the flap. Several witnesses stated that it was usual in such cases to put up a flap or penstock. The specification of the contract under which the Chelt Sewer was constructed did not contain any provision for putting up a flap or penstock; but it stated that the new sewer was to be inclosed by puddling *and made tight*; and the contractors supposed that they had performed their contract when they enclosed it with clay puddle and so delivered up the work to the Commissioners. On the 13th July, 1855, there was a heavy storm of rain, and a great flood in the river Chelt, which washed away the clay puddle used as a covering for the Chelt sewer, at the point where it passed under the river near the plaintiff's premises. The sewer burst, and the water of the river flowed into it. The Commissioners took immediate steps to remedy this. They erected a stank round the hole, and by that and other means the waters of the Chelt were drained away from it; and, so far as appeared by the evidence, there was nothing to complain of as to the manner in which that was done. On the 26th July, and before the repair of the sewer was completed, another extraordinary flood took place, in consequence of which the stank was washed away, and the water of the river rushed into the sewer and forced the sewage matter and water into the plaintiff's premises, thereby causing damage to the amount of 170*l*. The plaintiff's premises were

twelve feet below the summit level of the sewer. There was evidence that concrete ought to have been used as a covering for the Chelt Sewer, instead of clay puddle.

At the close of the plaintiff's case, the learned Judge expressed an opinion that the action was not maintainable. The plaintiff's counsel submitted that the Commissioners were liable on the following grounds.—First, they ought to have placed a flap or penstock at the mouth of Montpellier Bath Sewer, and not have left it open. Secondly, they ought to have used concrete and not clay puddle as a covering for the Chelt Sewer. Thirdly, that, after the damage to the sewer on the 13th July, they left it unrepaired for an unreasonable time. Fourthly, that the stank was put up by the Commissioners, not by the contractors, and therefore the Commissioners were liable in respect of it. The learned Judge nonsuited the plaintiff; reserving leave to move to enter a verdict for him for 170*l.*, the amount of damage agreed on by the parties; the Court to draw such inferences of fact as the jury ought to have drawn.

*Huddleston*, in last Michaelmas Term, obtained a rule nisi accordingly, against which

*Pigott*, Serjt., and *Gray* shewed cause in the present Term (May 1).—First, the Commissioners are not liable to actions for nonfeasance. The third section of the Cheltenham Improvement Act, 1852 (15 Vict. c. 1.), requires the Commissioners to “make all proper sewers and drains to communicate with the said intended main sewers,” and accordingly they reconstructed the sewer which drained the plaintiff's premises. The 20th section incorporates the 138th, 139th and 140th sections of the Public Health Act, 1848 (11 & 12 Vict. c. 63). By the 138th section, the Commissioners may be sued in the name of their clerk for any matter or thing *done* by them; but it does not render

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them liable for anything omitted to be done. The 139th section, which requires notice of action, and the 140th, which exempts them from personal responsibility, likewise relate to acts *done*. The 144th section, which is also incorporated with the Cheltenham Improvement Act, 1852 (sect. 26), enacts "that full compensation shall be made out of the general or special district rates to be levied under this Act to all persons sustaining any damage by reason of the *exercise* of any of the powers of this Act." The Commissioners are persons intrusted by parliament with power to do certain acts according to their discretion; they are chosen by the inhabitants of the town, and are their gratuitous agents, without any benefit to themselves; and as such, by the common law they are not liable in this action. The Commissioners were not guilty of any personal negligence; they employed contractors to perform the works. *Hall v. Smith (a)* decided that clerks of Commissioners entrusted with the conduct of public works are not liable in damages for any injury occasioned by the negligence of artificers employed under their authority. There *Best, C. J.*, in delivering the judgment of the Court, said: "If Commissioners, under an act of parliament, order something to be done which is not within the scope of their authority, or are themselves guilty of negligence in doing that which they are empowered to do, they render themselves liable to an action; but they are not answerable for the misconduct of such as they are obliged to employ. That decision was confirmed by *Humphreys v. Mears (b)*. [*Channell, B.*, referred to *Allen v. Hayward (c)*.] Those cases were referred to and approved of by Lord *Cottenham, C.*, in *Duncan v. Findlater (d)*. *Metcalfe v. Hetherington (e)* is also an autho-

(a) 2 Bing. 156.

(d) 6 Cl. &amp; F. 894.

(b) 1 Man. &amp; R. 187.

(e) 11 Exch. 257.

(c) 7 Q. B. 960.

rity that the Commissioners are not liable. *Parnaby v. The Lancaster Canal Company* (a) and *Gibbs v. The Trustees of The Liverpool Docks* (b) proceeded on the ground that the Commissioners, being in the receipt of sufficient funds from the tolls, were bound to apply them in rendering the navigation secure. The Commissioners as a body are not liable, because, in fact, there was no negligence on their part. If there was negligence on the part of any one, that Commissioner or other person through whose negligence the accident happened should have been sued. The funds of which they are trustees cannot be applied to pay for the consequences of their misconduct as individuals: *Duncan v. Findlater* (c). [Martin, B.—Suppose the contractor employed to build the sewers built them according to his contract, is it contended that he would be liable to an action?] The contractor, or the Commissioners who employed him, may be liable, but only as individuals: here they are sued as a body. There is nothing to make any one liable who was not a party to the wrongful act. Perhaps the Commissioners may be liable for negligence, on the ground that, in accepting the office, they impliedly undertake to pay proper attention to their duties. *Edwards v. Lowndes* (d) shews that the funds of the Commissioners are in their hands as trustees.—They then argued that there was no negligence in fact, either in the omission to put up a flap or penstock at the mouth of the Bath Sewer, or in not using concrete instead of clay puddle as a covering for the Chelt Sewer, or in the nonrepair of the damage done by the storm on the 13th July, or in the erection of the stank. [Bramwell, B., referred to *Degg v. The Midland Railway Company* (e).]

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(a) 11 A. &amp; E. 223.

(d) 1 E. &amp; B. 81

(b) 3 H. &amp; N. 164.

(e) 1 H. &amp; N. 773.

(c) 6 Cl. &amp; F. 894.

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*Huddleston* (with whom was *J. J. Powell*), in support of the rule.—*Scott v. The Mayor of Manchester* (a) shews that a municipal corporation may be liable for the negligence of their servants. [*Martin, B.*—In that case the corporation were in fact a Company making and selling gas for profit.] *Gibbs v. The Trustees of the Liverpool Docks* (b) established that trustees for public purposes, though not receiving profits for their own use, may be liable to actions for nonfeasance or negligence. In *Allen v. Hayward* (c), where a similar accident was caused by the negligence of the contractor in executing the works, it was held that the Commissioners were not responsible; but that they would have been liable if the act had been committed or caused by their agents or servants. Section 138 of the 11 & 12 Vict. c. 63 (The Public Health Act, 1848) provides that the local board of health of any non-corporate district may be sued, in the name of the clerk for the time being, concerning any matter or thing whatsoever relating to any matter done by them under the provisions of the Act, and that the clerk shall be reimbursed out of the general district rates all costs and damages. By sect. 139, provision is made for tendering amends. By section 144, full compensation shall be made out of the general or special district rates to all persons sustaining damage. It would, therefore, be no misapplication of the funds to compensate the plaintiff for the injury done to him, because there is a fund expressly provided out of which damages may be paid. By sect. 140, members of the local board and others acting in the execution of the Act are not to be personally liable. That answers the suggestion that the action should have been brought against the individual Commissioners. In *Ward v. Lee* (d) it was held that contractors who, acting bonâ fide under the Metropolitan Commissioners of Sewers,

(a) 1 H. & N. 59; 2 H. & N. 204.

(b) 3 H. & N. 164.

(c) 7 Q. B. 960.

(d) 7 E. & B. 426.

had injured the plaintiff's premises, were exempted from all liability by the 11 & 12 Vict. c. 112, and *Wightman*, J., in delivering the judgment of the Court, with reference to clauses in the 11 & 12 Vict. c. 112, similar to those in the present Act, says: "the object of the Legislature seems to have been not to leave the complaining party remediless, but to oblige him to bring his action against the Commissioners as a body in the name of their clerk, in which case the liability would not be personal; and any damages that might be recovered would be payable out of the funds at their disposal." *The Itchin Bridge Company v. The Local Board of Health of Southampton* (a) is an authority that this action is maintainable.—They then argued that the Commissioners were guilty of negligence in the several particulars above mentioned.

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The argument having been adjourned to the following day, the Court then intimated to *J. J. Powell* that it was not necessary to hear him.

MARTIN, B.—This was an action against the clerk to the Commissioners under a private act of parliament for better paving, draining, lighting, &c., and otherwise improving the borough of Cheltenham, and the circumstances were these (His Lordship then stated the facts as above set forth.)—The cause was tried before me at the last Gloucestershire Summer Assizes, and at the conclusion of the plaintiff's case I was of opinion that the Commissioners were not liable. I thought the weight of authority was, that such an action was not maintainable, and that the case of *Metcalf v. Hetherington* (b) was conclusive. The result was that I nonsuited the plaintiff, but gave leave to move to enter the verdict for him; the Court to draw such inferences of fact as the jury ought

(a) 2 B. H. T. 1858.

(b) 11 Exch. 257.

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to have drawn. A rule was obtained and has been argued, and we are now to decide whether the action is maintainable, and, if so, the amount of damage.

As to the question of liability—the reason why I reserved leave to move was, that at that time the case of *Gibbs v. The Trustees of the Liverpool Docks* (a) was pending in the Exchequer Chamber, and it was supposed that the principle of that decision would govern this. That case has been since decided, and whether it goes to the extent of establishing the liability of the Commissioners in this case may perhaps be questionable. But two cases were cited yesterday by which we think we are bound. One was *Ward v. Lee* (b), which, though not an express decision on this point, is very nearly so. That was an action against a contractor, and *Wightman, J.*, in delivering the judgment of the Court that the contractor was not liable, stated distinctly that the Commissioners were. The language of the statute in that case is nearly identical with the words relied on here. It may be said that case is not exactly in point, because the liability of the Commissioners was not the matter in controversy; but there is another case, *The Itchin Bridge Company v. The Local Board of Health of Southampton*, which shews that Commissioners are liable to an action for damages; and are entitled to reimburse themselves out of the rates for any sum which they may be called upon to pay in consequence of their carrying out the provisions of their Acts. We consider ourselves bound by those decisions, and therefore hold that in this case the Commissioners are liable.

Then, the liability being established, the next point is the question of damage. Four heads of alleged negligence were relied on; but for the present purpose I need only mention one, that is, the not making perfectly

(a) 3 H. & N. 164.

(b) 7 E. & B. 426.

tight the mouth of the Montpellier Bath Sewer with a flap or penstock. This flap had existed before the Chelt Sewer was made. The 15 Vict. c. l. directs "that the Commissioners shall make all proper sewers and drains to communicate with the intended main sewer," and they thought proper to make a sewer or drain communicating with the plaintiff's premises without this flap and the protection that was necessary, in consequence of which this damage happened; for if the flap had been there, in all probability the sewage water (which was the main cause of the damage) would never have reached the plaintiff's premises. We therefore think, that when the Commissioners thought proper to make a new sewer communicating with the plaintiff's premises from the old drain, and omitted to give him that protection which he had before, whereby there was a damage immediate and consequent upon it, that was such a damage from negligence as entitled him to maintain this action. For my part, I think that the Court ought to look on this matter with a liberal view, for if the question had gone to the jury, there is no doubt that they would have found for the plaintiff, and if they had so found, I should by no means have been dissatisfied with the verdict. We have had an opportunity of consulting on this point, and we all think that there was such negligence in not making this flap or penstock at the mouth of the sewer, communicating from the plaintiff's premises with the main sewer, that he is entitled to maintain this action in respect of the damage resulting therefrom. Leave was given to enter the verdict for 170*l.*, and although all the damage which accrued to the plaintiff did not arise from the sewage water, but was in part from the water of the river Chelt itself, yet there is no means of ascertaining accurately what damage resulted from the one and what from the other. The fair result of the arrangement made

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at the trial was, that in the event of the plaintiff being entitled to the verdict, 170*l.* should be the amount of damage. On these grounds I am of opinion that the rule ought to be absolute.

BRAMWELL, B.—I am of the same opinion. It seems to me that the first matter we have to decide is a question of fact, viz., whether the defendants are guilty of the negligence which the declaration charges. Now, negligence is a relative term. I adhere to the expressions in the judgment in *Degg v. The Midland Railway Company* (a): “There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place, or person.” Therefore, if the only negligence here imputed to the Commissioners had been negligence in not repairing the sewer within a reasonable time, or in not making it stronger than they did, inasmuch as the damage resulting from either or both of those matters only accrued by reason of there being an extraordinary storm, I should have said that there was no negligence or wrong in not anticipating that which could not be anticipated, and consequently no liability. But with respect to the flap or penstock the case is different. As to that, the fact essential to be mentioned is this,—the summit level or highest part of the sewer is twelve feet higher than the level of the plaintiff’s premises, and therefore it is obvious that, if the course of the sewer below the plaintiff’s premises was stopped, and the water still continued to pour in from the upper part of the sewer, the plaintiff’s premises must inevitably be flooded. That happened in this particular instance, because the course of the sewer was stopped by the irruption of the Chelt, and that was caused by an extraordinary storm. We call it extraordinary, but in truth it is not an extraordinary storm

(a) 1 H. & N. 773, 781.

which happens once in a century, or in fifty or twenty years; on the contrary, it would be extraordinary if it did not happen. There is a French saying "that there is nothing so certain as that which is unexpected." In like manner, there is nothing so certain as that something extraordinary will happen now and then. Therefore, it seems to me that the Commissioners, who ought to have put down a flap or penstock of a permanent character, in order to guard against a thing likely to occur, not only in a short time, but at all times, may well be said to be guilty of negligence relatively to the probable event of a storm happening within fifty years. So that the principle to which I have referred is not in any way violated. But then comes the question whether the flap or penstock is a natural and ordinary security in such case. Now, when we bear in mind that, without a flap or penstock, a stoppage of the sewer is inevitably followed by a flooding of the plaintiff's premises, there is a good *prima facie* case that it ought to have been there. In addition, there is the evidence of several witnesses that it is the custom in such cases to put up a flap or penstock. Then, sitting here as a jurymen, I am of opinion that the negligence or wrongful conduct of the Commissioners is made out in not putting up the flap or penstock, which is usual, at the place where there is danger of flooding, and that the damage resulting from it is the damage alleged in the declaration, and consequently that the declaration was proved.

Then comes the question whether the action is maintainable. Mr. *Gray* argued that the Commissioners, in their quasi corporate character, never can be liable for a wrong or negligence of this kind; but, if he is right, the objection is on the record. However, it seems to me that we may dispose of this question by saying that the case of *The Itchin Bridge Company v. The Local Board of Health of Southampton* is in

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point; and therefore we are bound by that decision, even if we did not agree with it, which I most certainly do. I think the reasoning in that case was perfectly correct. I cannot help making this remark generally.—I can well understand if a person undertakes the office or duty of a Commissioner, and there are no means of indemnifying him against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that, if one of several Commissioners does something not within the scope of his authority, the Commissioners as a body are not liable. But where Commissioners, who are a quasi corporate body, are not affected by the result of an action, inasmuch as they are authorized by act of parliament to raise a fund for payment of the damages, on what principle is it that, if an individual member of the public suffers from an act *bonâ fide* but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law. I do not think that the case of *Duncan v. Findlater* (a) establishes the proposition for which Mr. Gray contended. At all events, a Court of co-ordinate jurisdiction has, to my entire satisfaction, decided upon the construction of this particular statute and that case governs this.

CHANNELL, B.—I am also of opinion that the rule ought to be absolute. One question raised at the trial was whether there was negligence on the part of the Commissioners: the other question was whether, assuming that negligence existed, there was a legal liability, on the part of the Commissioners, sued in the name of their clerk, to make compensation for that negligence. I will first deal with the question of fact. The negligence imputed was not negligence in the execution of the works according to

(a) 6 Cl. & F. 894.

the contract, but negligence in the character and description of the works. Undoubtedly, there had been imperfection in the character, and some delay in the execution, of those temporary works which were resorted to by way of expedient in order to avert the consequences of the damage done by the flood on the 13th of July. The question of negligence raised this point—whether there was negligence in the character and description of the works, as provided for by the original contract. I am of opinion that there was evidence of such negligence. I take it, the course adopted at the trial was this:—A question of law having arisen, it was thought convenient to reserve it. It was also thought convenient to reserve the question of negligence, placing the Court in the position of a jury. Upon the question of fact, it appears to me that evidence of negligence was given on the part of the plaintiff, wholly un rebutted and uncontradicted by the evidence on the part of the defendant; certainly not met by direct evidence, for he did not offer any, and I think it was not by the cross-examination of the plaintiff's witnesses. Therefore I think that there was such evidence of negligence as to entitle the plaintiff to our judgment on that point. I also agree with my brother *Martin*, that although it is difficult to say that 170*l.* is the exact amount of damage which resulted from the negligence; yet it was agreed by the parties at the trial that if the plaintiff was entitled to recover, the damages should be assessed at that sum.

Then comes the other question, are the Commissioners, who are sued in the name of their clerk, responsible on this record for their negligence? I am of opinion that they are. The case of *Gibbs v. The Trustees of the Liverpool Docks* (a) was cited at the trial, and was then pending in the Court of Exchequer Chamber. That case had a very important

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bearing on the subject, but, looking at the decision of the Court of Exchequer Chamber and the grounds of the judgment, it does not seem to me an authority by which we can decide this case one way or the other. But the cases of *Ward v. Lee* and *The Itchin Bridge Company v. The Local Board of Health of Southampton* appear to me to present such an analogy that we may safely decide this case on those authorities. For the reasons which my learned brothers have already given, and because those authorities govern this case, I think that the rule ought to be absolute.

POLLOCK, C. B.—I did not hear the argument yesterday, and it would be improper for me to say anything approaching to a decision ; but I think it right to express my entire concurrence in the general principle upon which the Court has decided the case. I see nothing in the character of the Commissioners as a public body, or in the fact that they are discharging a public duty without any remuneration, to exempt them from liability to compensate a person who has suffered by their carelessness or want of due regard in the performance of their duty. They are entitled to reimburse themselves out of the funds over which they have controul, and it would be hard indeed to throw on the plaintiff the loss which has been sustained, rather than let it be paid out of the common fund which the Commissioners have at their disposal.

Rule absolute.

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#### MEMORANDUM.

In the present Term *David Power, Esq.*, of Lincoln's Inn, was appointed one of Her Majesty's Counsel.

# Exchequer Reports.

TRINITY TERM, 21 VICT.

BATEMAN v. The MAYOR, ALDERMEN and BURGESSES of 1858.  
the Borough of ASHTON-UNDER-LYNE.

June 12.

**DECLARATION.**—The plaintiff by &c., sues the mayor, aldermen and burgesses of the borough of Ashton-under Lyne for money payable by the defendants to the plaintiff, for work done and materials for the same, provided by the plaintiff for the Ashton-under-Lyne Waterworks Company, at the request of the said Company, &c., and for work done, &c., by the plaintiff for the defendants, &c.

Generally speaking corporations are as much bound by their contracts as individuals, where the seal is affixed in a manner binding on them; and where a corporation

is created by act of parliament for particular purposes, with special powers, their contract will bind them unless it appears by the express provisions of the statute creating the corporation, or by necessary and reasonable inference from its enactments that the contract was ultra vires; or that the legislature meant that such a contract should not be made. *Per totam curiam.*

A Company was incorporated by act of parliament for the supply of a certain district with water from certain sources within that district; and empowered to break up highways and place pipes within the district, and to do all other acts which the Company should deem necessary for supplying water to the inhabitants according to the true intent of the Act, and penalties were imposed on the Company not supplying water to the inhabitants of dwelling-houses within the district. The members of the Company were entitled to the net profits to be divided amongst them, except the surplus above 7 per cent., which was to go in the reduction of the water rents. In consequence of the increase of population the supply of water within the district became insufficient both in quantity and quality. The Company employed an engineer, who reported that a sufficient supply could not be obtained from existing sources, and recommended that a supply should be obtained from a brook beyond the district, which would be sufficient not only for the district but also for some adjoining populous villages. The Company then determined to apply to parliament for powers to enlarge their works so as to make the brook available for the entire district which it was capable of supplying, and to increase their capital from 15,000*l.* to 90,000*l.*—*Held*, that the Company might lawfully take steps to apply to parliament for such extension of the undertaking, it being for the benefit of the corporate body; and that the contracts made by the Company for the supply of plans, &c., essential to the application to parliament, were not necessarily illegal or void, or otherwise incapable of being enforced against the Company in a Court of law. *Dissentiente Bramwell, B.*

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Pleas: First, never indebted.—Secondly, to the part of the declaration in which the Ashton-under-Lyne Waterworks Company is mentioned, that the Company never was indebted to the plaintiff.—Issues thereon.

The cause was tried before *Martin*, B., at the Middlesex sittings in last Michaelmas Term, when it appeared that the action was brought to recover a sum of 202*l.* under the following circumstances.—By the 5 & 6 Wm. 4, c. lxi. (1835), entitled “An Act for better supplying with water the town of Ashton-under-Lyne, and the neighbourhood thereof within the parish of Ashton-under-Lyne, in the county palatine of Lancaster,” a corporate body was formed called “The Ashton-under-Lyne Waterworks Company”(a). The Company proceeded to carry the Act into execution,

(a) 5 & 6 Wm. 4. c. lxi., reciting that “a better supply of water for domestic and other purposes would be of great advantage to the inhabitants of the town of Ashton-under-Lyne, and the neighbourhood thereof: And whereas such supply of water may be obtained from certain springs and watercourses situate at or near Tombottom and Knott-hill in the said parish of Ashton-under-Lyne, on lands claimed to be the property of the Right Honourable George Harry Earl of Stamford and Warrington: And whereas the several persons hereinafter named are willing at their own expence to carry into execution the said undertaking, but the same cannot be beneficially effected without the aid of parliament: enacts:—The subscribers “shall be and they are hereby united into a Company for constructing and maintaining the

waterworks and other works by this Act authorized, according to the provisions and restrictions hereinafter contained, and for that purpose shall be one body corporate,” &c.

By sect. 4 the Company are empowered “to raise amongst themselves any sum of money for constructing and maintaining the works by this Act authorized, not exceeding in the whole the sum of 15,000*l.*”

Section 18 provides for the election of “a committee of management of the concerns of the said Company.”

By section 22, “No member of the committee for the time being shall become personally answerable for the performance of any agreement into which he shall or may have entered as one of such committee on behalf of the said Company; but all persons with whom any such contracts or

and the works were completed. In the period of nineteen years from 1835 to 1854 the population of Ashton-under-Lyne had nearly doubled. In 1854 the water obtained from the old works was deficient in quantity, and as to part of the supply so bad, as to be unfit for domestic purposes.

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agreements shall from time to time be entered into by the said committee, shall have full powers to resort to and proceed against the said Company, either at law or in equity, for the performance of any such contract and agreement, or for damages occasioned by any breach or non-performance thereof; and the joint stock and property of the said Company shall from time to time be answerable and accountable for the due performance of any contract entered into by the said committee; and for all damages which shall be recovered by reason of any breach or non-performance thereof."

By section 27, the Company are empowered to construct water-works, &c., "and to supply with water by means of such water-works the limits of this Act, from certain springs and watercourses at or near Tombottom and Knott-hill, in the said parish of Ashton-under-Lyne; and also from such springs, watercourses and other sources of water as may be found in constructing the said water-works and other works by this Act authorized."

By section 62, "The limits of this Act shall be deemed and taken to extend to and include the parish of Ashton-under-Lyne in the county palatine of Lancaster, except so much thereof as

lies within the town of Staley-bridge."

By section 63, "For the purpose of supplying water to the inhabitants within the limits of this Act," it shall be lawful for the Company to "open and break up the soil, pavement, &c., of highways, &c., within the said limits; and also any sewers, &c., and to lay and place within such limits pipes, conduits and other apparatus and conveniences, and to do all other acts which the said Company shall from time to time deem necessary for supplying water to the inhabitants of the said limits according to the true intent and meaning of this Act," &c.

Section 81 imposes penalties on the Company not supplying water to the inhabitants of dwelling-houses within the limits of the Act.

By section 87, an account is to be kept, to be balanced twice a year, of the money received for the use of the Company, "and of the charges and expenses of constructing, maintaining and carrying on the undertaking, and of all other the receipts and expenditures of the Company and of the committee up to that period." And the Company are empowered at their half yearly meetings to make dividends out of the clear profits of the undertaking not exceeding 7l. 10s. per cent.

By section 88, if the profits are

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In the year 1854 the agent of the Earl of Stamford, who was a very large land and house owner in the town and parish of Ashton, complained of the water supply being deficient both in quantity and quality, and threatened that unless an improvement in the supply was effected, an application would be made upon the subject to parliament. In consequence, the committee of management of the Company duly appointed, and acting under the 23rd section of the Act, employed the plaintiff, who was an engineer, to investigate whether an increased and improved supply of water could be obtained. He did so, and reported that any extension of the then existing works would be insufficient, and recommended that a supply of water should be obtained from a brook called Swineshaw Brook, which he stated would be sufficient, not merely for the supply of the town and parish of Ashton, but also for Staleybridge and Duckinfield, and several populous villages in the immediate neighbourhood. The result was, that the committee of management, on the 3rd of November, 1854, by a resolution duly entered in their said books, determined to apply to parliament for powers for the Ashton-under-Lyne Waterworks Company to make works, so as to render available the Swineshaw Brook for the entire district for which it would be available, and that the plaintiff should prepare the plans required by the standing orders of parliament. The committee of management then opened a prospectus, in which they proposed the above extension, and required subscribers to an addi-

more than sufficient to pay 7l.10s. per cent. a reduction is to be made in the amount of the water rates: "Provided that such reduction shall not be made to the prejudice of any works that may be necessary for maintaining or

extending the mains, pipes or other works of the said Company, so as to carry the purposes of this Act into full effect," &c.

By section 134, the Act is declared to be a public Act.

tional capital of 90,000*l.*, in shares of 20*l.* each, to enable the new works to be effected. On the 13th of December, 1854, a special general meeting of the Company was duly held in pursuance of and in conformity with the Act, at which it was resolved that the committee be authorized to proceed with the application to parliament for the extension as described in the prospectus, *and the proceedings of the committee in reference thereto were confirmed.* The committee employed the plaintiff in accordance with their resolution of the 3rd of November. He made the necessary plans prescribed by the standing orders and had them lithographed, and this action was brought to recover the expence of the lithographing. Under an Act, 18 Vict. c. lxx., the defendants, being the municipal corporation of Ashton-under-Lyne, became the purchasers of the Water Company's Works and liable to pay their debts (a).

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(a) Section 11. All agreements "made or entered into before the passing of this Act, with, &c., or on behalf of the Company or any person on their behalf, shall be and remain as good, valid, and effectual in favour of, against, and with reference to the corporation, and may be proceeded on and enforced, in the same manner, to all intents and purposes, as if the corporation, instead of the Company or such person, had been party to and executed the same, or had been named or referred to therein or privy thereto."

Section 14. \* \* \* "All debts and all monies which, immediately before the passing of this Act, are due or owing by or recoverable from the Company, or for the payment of which the Company are or but for this Act would be liable, shall

be paid, with all interest (if any) due or to accrue due thereon, by or be recoverable from the corporation."

Section 15. "From and after the passing of this Act, the corporation shall be subject to and shall perform and confirm and be liable to all covenants, conditions, agreements, directions, duties, liabilities, debts, charges and restrictions, including the obligations of the recited Act, to which the Company at the time of the passing of this Act are or but for this Act would be or become subject or liable, and shall indemnify the Company and the several shareholders thereof and their respective heirs, executors, administrators, successors and assigns, estates and effects, from all such covenants, conditions, agree-



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The learned Judge proposed to the counsel for the defendants to leave to the jury any question he desired, either as to the propriety of the step taken by the committee of management, or as to the confirmation of it by the special general meeting, or as to the proposed extension itself, whether it was not in fact for the benefit of the Company, or any other question he might suggest. But he stated that he did not desire any question to be left to the jury at all: that his contention was that the contract with the plaintiff was ultra vires; and that although the Waterworks Company and the committee had complied with every form prescribed by the act of parliament to make the contract binding upon the Company, and the shareholders at a special general meeting duly called had confirmed it, and the extension itself would be for the benefit of the Company, nevertheless the contract with the plaintiff was ultra vires, and no debt was or could be created under it; and that the Waterworks Company not being liable the defendants were not liable. He also objected that mandamus and not an action was the proper remedy. A verdict was entered for the plaintiff, leave being given to move to enter it for the defendants.

*Hugh Hill*, in the same Term, obtained a rule nisi to set aside the verdict, on the ground that the facts proved at the trial did not shew that the debt sought to be recovered was recoverable from the defendants within the meaning of the 18 Vict. c. lxx., s. 14.

*Monk and Crompton Hutton* shewed cause (a).—By the

ments, directions, duties, liabilities, debts, charges and restrictions, and all costs, charges and expenses incurred by reason thereof, or of the non-perform-

ance or undue performance thereof respectively."

(a) In Easter Term, April 16. Before *Martin*, B., *Bramwell*, B., and *Channell*, B.

5 & 6 Wm. 4, c. lxi., s. 63, the committee of management of the Company had power to do all acts which the Company should from time to time deem necessary for effectually supplying water to the inhabitants within the limits of the Act. It is conceded that the work done was for the benefit of the Ashton-under-Lyne Waterworks Company. Therefore this is not like the case where the contract is entirely foreign to the purpose for which the Company has been created. It is a mistake to suppose a corporation is prohibited from making every contract which it is not expressly authorized to make. Corporations have power to enter into contracts respecting any matters ancillary to the purpose for which they are incorporated. In the case before the Court the old limits included a district, the population of which had increased enormously. The Company, by s. 81, were bound to supply water to the inhabitants of any dwelling-house within the district. The supply of water obtainable within the old district was insufficient. It was therefore within the scope of the general conduct and management of the Company's affairs by the committee to procure a supply of water. In order to shew that the Company were not bound, the defendants should have shewn that the measures adopted were not wise, prudent and proper to be adopted for the supply of the old district. But the contrary is admitted. It is unimportant that the supply was sought out of the district to which the Act applied. [*Channell, B.*—It may be that the Company had two objects in view, one of which was strictly lawful, namely, the improved supply of water within the limits of the Act. Is the contract necessarily an indivisible contract?] In *The Attorney General v. Andrews* (a) Commissioners under a local act of parliament for providing a supply of water for the inhabitants of Southampton, who

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(a) 2 Hall & Twells, 431; S. C. 2 M'N. & G. 225.

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were empowered to maintain the existing waterworks, &c., and to improve the same, and to build other waterworks, &c., on a certain common, and to collect water by boring under the said common, &c., and to make an assessment on the inhabitants, and to apply the monies collected in maintaining the works and otherwise in carrying the Act into execution, were restrained by injunction from applying monies received from such rates in making application to parliament for powers to take water from other parishes and places. That, however, was simply a question whether, as between the corporation and the inhabitants, the funds could be expended in applying to parliament for an extended scheme. The case of *Bright v. North* (a), cited by the Lords Commissioners, and *The Attorney General v. The Mayor, &c., of Wigan* (b), shew that, if the application to parliament had been in self-defence, a different rule might have applied. [Channell, B.—The question in *The Attorney General v. Wigan* (b) turned upon the construction of the Municipal Corporation Act.] Even if this case were similar in its facts to *The Attorney General v. Andrews* (c), it is not clear that the plaintiff could not sue. In *The Directors of the Eastern Counties Railway Company v. Hawkes* (d), the House of Lords held that a person dealing with an incorporated Company is not bound to see that a contract with such Company is strictly authorized by their Act of incorporation; and that if he does not know of any intention to misapply the funds of the Company, but acts bonâ fide in the matter, he may enforce the performance of the contract. *McGregor v. The Official Manager of the Dover and Deal Railway Company* (e) will be relied upon by the other side. But that case is distinguishable

(a) 2 Phill. 216.

S. C. 2 M'N. &amp; G. 225.

(b) 5 De Gex, M'N. &amp; G. 52.

(d) 5 H. L. 331.

(c) 2 Hall &amp; Twells, 431;

(e) 18 Q. B. 618.

on the grounds alluded to by Coleridge, J., in *The Mayor of Norwich v. The Norfolk Railway Company* (a); that is, the "distinction between a difference of purposes and a difference of means and modes by and through which the same purpose is to be effected." A contract with a corporation is not void unless it appears obviously foreign to the object for which the Company was established. In *The Eastern Counties Railway Company v. Hawkes* (b), Lord St. Leonards said: "The mere circumstance of a covenant by directors in the name of the Company being ultra vires as between them and the shareholders does not necessarily disentitle the covenantee to sue upon it." The question is, whether there is anything in the Act of incorporation which expressly or impliedly forbids the making of the contract sought to be enforced. If not, the contract must be deemed legal: *The Directors of the Shrewsbury and Birmingham Railway Company v. The Directors of the London and South Western Railway Company* (c).

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*Hugh Hill and Spinks*, in support of the rule.—The 18 Vict. c. lxx., reciting that the Ashton-under-Lyne Waterworks Company were willing that their undertaking should be transferred to the mayor, aldermen and burgesses of the borough on the terms provided for by the Act, by section 2 empowered the Company to sell to the corporation "the undertaking of the Company." By section 14, all monies which immediately before the passing of the Act were due or owing by or recoverable from the Company, were to be paid by the corporation. This must relate to monies due by them in respect of the undertaking to be transferred. [*Martin, B.*—Looking at the 15th section, it is clear that the question is, was the Company liable?] By the recitals, and by the 1st and 27th sections of the

(a) 4 E. & B. 397; see p. 432.

(b) 5 H. L. 331, 372.

(c) 6 H. L. 113.

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5 & 6 Wm. 4, c. lxi., it appears that the Company was incorporated for the supply of water from particular sources to a limited district. The inhabitants of the district had an interest in the funds of the Company. By section 87, they are entitled to a reduction of the water rents when the dividends of the Company exceeded 7l. 10s. per cent. It was therefore not legal to divert the funds of the Company from the purposes to which the Act directed that they should be applied. Preparing plans to enable the Company to apply to parliament for enlarged powers is not a proper application of the funds according to the Company's Act. Being a public Act, the plaintiff must be taken to have had notice of its provisions. It makes no difference that the application was for the benefit of the Company and the district. The Company had only a limited authority; and their funds can only be applied for the purposes directed and provided for by the statute: *The East Anglian Railways Company v. The Eastern Counties Railway Company* (a). [Bramwell, B.—These acts of parliament are two fold, consisting partly of that which is in the nature of a deed of settlement, and partly of powers with reference to the public. Perhaps it was a mistake to hold that the part which resembles a deed of settlement has the force of a public statute; but, if so, that doctrine can only be reversed in the House of Lords.] Here, the Company proposed to form a new Company with increased capital and enlarged powers; and this work was done in order to enable them to proceed with the necessary application to parliament. *The Attorney General v. Andrews* (b) is an express authority that this was not “carrying into execution the powers of their Act,” and that they had no power to apply their funds to such a purpose. That case is in point, because the Company

(a) 11 C. B. 775.

(b) 2 Hall & Twells, 431.

here sought to do away with the existing Company, not merely to improve the existing works. The case of *Bright v. North* (a) is distinguishable, because opposing a bill for a project likely to be injurious to banks which the corporation were bound to maintain, was merely a prudent and necessary step for the protection of the property entrusted to their care. But, in *Munt v. The Shrewsbury and Chester Railway Company* (b), the Master of the Rolls said: "Companies possessed of funds for objects which are distinctly defined by act of parliament cannot be allowed to apply them to any other purpose whatever, however advantageous or profitable that course may appear to be to the Company;" and he therefore held that the directors of a railway company, whose prosperity depended in a great measure on the navigation of the river Dee being kept in a good state, could not legally apply any of the railway capital in payment of the expenses of promoting a bill in parliament for the preservation and improvement of the navigation. [*Martin*, B.—Suppose an Act had passed increasing the capital of the Company. *Bramwell*, B.—That might have been a parliamentary recognition that the Company, in obtaining it, were not acting ultra vires.] If there be no defence to this action, the Court of Chancery could never say that the funds of the Company should not be applied in payment of their legal debts. The cases in Chancery therefore, in which companies have been restrained from applying the funds to purposes foreign to the object of the incorporation, shew in effect that such contracts are illegal. [*Martin*, B.—Should not the defence have been pleaded?] In *The Copper Miners' Company v. Fox* (c) a similar defence was given in evidence under non-assumpsit

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(a) 2 Phill. 216.

(b) 13 Beav. 1.

(c) 16 Q. B. 229.

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The learned Judges differing in opinion, the following judgment was now delivered, on behalf of himself and *Channell, B.*, by

MARTIN, B.—(His Lordship after stating the facts as *antè*, p. 324, proceeded as follows):—It seems quite clear that if the plaintiff be unable to recover in this action he cannot recover at all. The 22nd section of the 5 & 6 Wm. 4, c. lxi., enacts that the members of the committee shall not be personally answerable for the performance of agreements into which they shall have entered on behalf of the Company; but the section proceeds to enact, that persons with whom any contract shall be entered into by the committee shall have power to proceed against the Company, either at law or in equity, for the performance of such contracts; and the joint stock and property of the Company shall be answerable for the due performance of the contracts entered into by the committee, and for the damages by reason of their breach. This, no doubt, must be taken to mean legal contracts; and the question, in my opinion, is, whether the contract with the plaintiff was a legal one. The argument on behalf of the defendants was, that under the act of parliament the power and business of the Company was strictly confined to the works and undertaking sanctioned by the Act; and that the provision, that the income and profit of the undertaking should be divided amongst the shareholders to the extent of 7*l.* 10*s.* per cent., and if the income exceeded that sum then a reduction should be made in the water rates, was conclusive to establish that this contract could not be legally made, because the payment in respect of it would necessarily reduce the dividend. I do not think that provision much affects the case; for by the section (the 87th) the dividend is to be made after the payment of the expenditure of the Company and

the managing committee; and if there was a legal contract the payment in respect of it would be lawful expenditure. The real question, therefore, is,—can a Waterworks Company, for the supply of a town and district with water, being a corporation established by an act of parliament, the members of which are entitled to the net profits to be divided amongst them, with the consent and sanction of the body at a legal meeting duly convened, take steps to apply to parliament for an extension of the undertaking, the extension being (as it must be taken to be in this case) for the benefit of the corporate body; and is the contract made by the corporation to pay for the labour essential to the application to parliament of necessity illegal and void, and incapable of being enforced in a Court of law?

I think the law on this subject is correctly laid down by Lord *Wensleydale* in his judgment in *The South Yorkshire Railway Company v. The Great Northern Railway Company* (a), and by Mr. Justice *Erle* in *The Mayor of Norwich v. The Norfolk Railway Company* (b). It is to the effect that generally speaking corporations are bound by their contracts as much as individuals: that where the seal is affixed on the contract made by a corporation in a manner binding upon them the contract is the contract of the corporation, to be governed by the same rules of law as the contracts of private persons. But where a corporation is created by an act of parliament for particular purposes, with special powers, another question arises, and the contract does not bind them if it appear by the express provisions of the statute creating the corporation, or by necessary and reasonable inference from its enactment, that the contract was *ultra vires*, that is, that the legislature meant that such a contract should not be made. The question, Lord *Wensleydale* says (c), appears

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(a) 9 Exch. 84.

(b) 4 E. &amp; B. 413.

(c) 9 Exch. 85.



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to be this,—“Whether it can be reasonably made out from the statute that the contract is ultra vires—in other words forbidden to be entered into;” and in another part of his judgment (p. 88), he states that “it not being made out that the Act prohibits the contract, it must be enforced.”

Mr. Justice *Erle* adopts the same view of the law.

The question, therefore, in my judgment, is,—Is the contract with the plaintiff forbidden by the Act of 1835? I think it is not. There is no express prohibition, and I think there is no implied one. It appeared in evidence that in the period of nineteen years, from 1835 to 1854, the population of Ashton-under-Lyne had more than doubled; that the water obtained from the old works was deficient in quantity, and as to part of the supply so bad, as to be unfit for use for domestic purposes. Under such circumstances, nothing seems to me more reasonable than that the Waterworks Company should apply to parliament for an extension of their powers, and especially as the step was taken with the concurrence and sanction of the shareholders duly convened at a special general meeting. The extension itself must be taken to be an advantageous and beneficial proceeding for the Company. I cannot see that there is any prohibition, express or implied, against the Company and its committee of management taking the step. On the contrary, to my mind it is what I should expect to occur, almost of necessity, after a period of nineteen years, in the case of waterworks for the supply of such a town and neighbourhood as Ashton-under-Lyne.

Suppose every shareholder in the Company had been present at the special general meeting of the 13th of December, and a resolution confirmatory of the proposal to apply to parliament, and of the employment of the plaintiff by the committee of management, had been unanimously made, would the contract to pay the plaintiff have been unlawful?

It would seem impossible that it should be so; but nevertheless it must if the contention on behalf of the defendant be well founded.

I do not at all mean to differ from any of the cases cited on the argument. I am content to take the law as laid down in *The East Anglian Railway Company v. The Eastern Counties Railway Company (a)*, and in *M'Gregor v. The Official Manager of the Dover and Deal Railway Company (b)*, in conjunction with what I have already referred to as being stated by Lord *Wensleydale* and Mr. Justice *Erle*.

The cases in equity which were cited were as between the Companies and their shareholders, where the question is very different from that between a third person and the Company, being a corporation, upon a bonâ fide contract.

As to the honesty or dishonesty of the defence, different persons will no doubt entertain a different view. For myself I concur with that expressed by Lord St. *Leonards* in the House of Lords in *Hawkes v. The Eastern Counties Railway Company (c)*, and the Court of Common Pleas in a case which occurred a few days ago (*d*).

There was another point taken by the plaintiff that this defence should have been pleaded. As I think he is entitled to recover on the merits there is no occasion to give an opinion upon it.

BRAMWELL, B.—I am of opinion this rule should be made absolute. The question is whether there was any evidence that the Ashton-under-Lyne Waterworks Company was indebted to the plaintiff.

He had, in conformity with the directions of the committee of management, done work which entitled him to

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(a) 11 C. B. 775.

(c) 5 H. L. 331.

(b) 18 Q. B. 618.

(d) *Frend v. Dennett*, C. P., T. T. 1858.

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the sum he claimed, unless the employment was ultra vires of the committee. I am of opinion it was.

The Company originally constituted had a definite area, and was incorporated to supply a particular district by means of certain described works, deriving the water from certain sources. The work which the plaintiff was employed to do was in reference to a plan, and was useless, except in reference to a plan, for applying to parliament to entirely alter the scheme of the old Company. Its capital was to be six-fold, its area vastly larger, and its supplies additional; and this at least is certain, that without the authority of parliament the plaintiff's plans were useless; that if the works of the Company continued the same as, and no more altered than, in conformity with the original scheme and agreement of the shareholders, the plaintiff's labour was in no way in furtherance or prosecution of the original scheme. But it was said to be, and may be taken to be in self-defence, that is to say, complaints had been made, and threats that other works would be executed, by other persons, to the great detriment of the Company. It was also said, and may be taken to be, that the water proposed to be taken by the plaintiff's plan would be beneficial to the area within which the original scheme confined the plaintiff.

Now I do not stop to consider whether, the employment being an entirety, if ultra vires in part, it is not void as to the whole, or whether at all events the plaintiff should be paid for part only; because I am of opinion the employment was ultra vires in toto. There was no part of it which was within the original scheme. The area to be supplied was larger; the water to be obtained was additional and different; and other means, additional capital, were to be resorted to. And I cannot see how, or in what way, a com-

mittee of management, appointed to manage the concern as constituted by the act of incorporation, would have authority to employ the plaintiff to do that which is useless unless something is done which is clearly not within their authority. This seems established by *The Attorney General v. Andrews (a)*. I do not say there may not be small matters, not within the very words of the main scheme, which may not be arranged or ordered by a board of directors; but they must be necessary or auxiliary to the main scheme—as the delivery of parcels by a railway off its line, which I suppose is lawful and in ultra vires (b).

If the plaintiff's employment had been under seal, I think the case would be governed by *The East Anglian Railway Company v. The Eastern Counties Railway Company (c)*. There is here, the same as there, an incorporation for a particular purpose, a direction to apply the capital in a particular way, and a corresponding direction as to profits. By that authority, enforced as it has since been, we are bound, though I reserve to myself, if the question ever arises in the ultimate Court of Appeal, the right to consider whether, at common law, the powers of a corporation created for a particular purpose are restricted thereto; whether that is illegal, which is not prohibited, merely because it is not expressly permitted, and whether if the authorized persons have affixed the seal of the Company, it can deny its deed, or its efficacy; whether, wherever the seal is affixed the question is not "factum or non factum;" whether many of the clauses in these acts of parliament are more than a substitute for a deed of settlement of the Company, and whether the remedy for breaches of such clauses is not the same as for other breaches of trust, and

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(a) 2 Hall & Twells, 431.

& N. 708.

(b) See *Wilby v. The West Cornwall Railway Company*, 2 H.

(c) 11 C. B. 775.

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whether the Court can say that the public have more interest in the application of the funds of the corporation one way than another. But the deed is not under seal, and according to *The London Dock Company v. Sinnott* (a) the Company are not bound thereby. This point, however, is waived, and it is admitted that the resolution to employ the plaintiff is sufficient to bind the Company unless ultra vires. I think it is, and consequently there is no contract. The committee exceeded their authority, and there is no contract consequently by the Company any more than though it had been made on their behalf by a clerk or rate collector. And this last consideration shews that the question is raised by the plea denying the debt. The matter may be illegal; but it is also without authority. I in no way doubt the correctness of what Lord *Wensleydale* said in *The South Yorkshire Railway and River Dee Company v. The Great Northern Railway Company* (b): on the contrary I think it an authority in support of this view.

I cannot help adding an observation on the objection made to the honesty of a defence of this description. It is said the Company has contracted and the Company repudiates its contract. There cannot be a more perfect fallacy. "Persons without authority have affected to contract for the Company, and the Company repudiates the Act" is the true expression. A. B. and C. are in partnership as hatters; A. buys boots in the name of the firm, and the sellers sue A. B. and C., who say they did not contract. It may be wrong in A., but are B. and C. to blame? I do not say these corporation cases are cases of partnership, but the principle is the same. And when I consider the mischief that has been done by directors, under the temptations offered by interested parties and other considerations, add-

(a) Q. B. M. T., Nov. 6, 1857. *Brierly Union*, Q. B. T. V. 1858.  
See *Haigh v. The Guardians of the* (b) 9 Exch. 55.

ing to the schemes in which parties have contributed their capital, I own, hard as it may be in a particular case, I am not sorry that a lesson should be read, that those who deal with directors must see they have authority to bind their Companies, or must trust the directors personally, a consideration which will make both parties more cautious in their speculations with other people's property.

Rule discharged.

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**EJECTMENT.**—The action was brought by the plaintiff, as heir at law of his father the Rev. Charles Price, to recover a certain estate called Garthfelin from the defendant, who claimed as devisee under a will of the said Rev. Charles Price.

At the trial, before *Crowder, J.*, at the last Summer Assizes for the county of Brecon, the plaintiff, who was examined in support of his case, stated that, about a fortnight before the death of his father, a conversation took place between himself and his father about some debts in respect of which the plaintiff was surety for his father, and that he then asked his father how he had disposed of his property by his will, and, on being informed that he had left the property in question to the defendant's wife, the plaintiff expostulated with his father, and said that he should be ruined. The father said he never thought of that; he would destroy his will at once. He went up stairs and into his study where he kept his papers, and when he came back he brought a paper in his hand, and said, "this is the will." He tore off the seal, and threw it into the fire. The plaintiff's mother, who was present, said, "Why not put it all into the fire at once?" His father

A person having made his will, executed under seal and published and attested as a sealed instrument, afterwards, for the purpose of revoking it, tore off the seal and with it part of a word:—*Held*, that the act of tearing off the seal was sufficient within the 20th section of 1 Vict. c. 26, and that the will was thereby revoked.

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said he had destroyed many wills before, and it was a complete cancellation. The father then gave the will to the plaintiff to read: the plaintiff then gave it back to him, and he put it into his pocket. On cross-examination, the plaintiff stated that his father said that he wanted to keep the will to make another by. The plaintiff's evidence on this head was confirmed by the testimony of his mother.

The will, when produced, was on one sheet of paper, forming two leaves with four pages, and was executed in this form:—"In witness hereof I have, to this my last will and testament, contained in four pages, set my hand and seal, that is to say, to the first three pages hereof I have set my hand, and to the last page I have set my hand and seal this, &c. Charles Price." (L.s.) The attestation stated it to be "signed, *sealed*, published," &c. In tearing away the seal, which was on the fourth page, the testator tore away a part of the first leaf on which was the letter "e" in the word "the," and also the letters "ral," part of the word "funeral," occurring in a devise charging the testator's funeral expenses on certain houses. About a fortnight afterwards, on the 28th of March, 1849, the testator died.

Upon these facts it was contended by the defendants' counsel that the act done was not sufficient to revoke the will, it not being sufficient to satisfy the words "burning, tearing, or otherwise destroying" the will in the 20th section of the 7 Wm. 4 & 1 Vict. c. 26. The learned Judge told the jury that, unless they thought the will was destroyed, they must find for the defendants; that if the seal was torn off by the deceased with an absolute intention of destroying the will, it was a sufficient revocation of the will. The jury found a verdict for the plaintiff. Leave was reserved to the defendants to move to enter a nonsuit or verdict for the defendants, if the Court should be of opinion

that the tearing off of the seal from the will was not a sufficient revocation.

A rule having been obtained by *Grove* for that purpose, in Michaelmas Term, cause was shewn in Hilary Vacation (10th and 11th February) by *Hugh Hill*, *T. Allen* and *G. B. Hughes*; and *Grove*, *Giffard* and *Bowen* were heard in support of the rule, before *Martin*, B., *Bramwell*, B. and *Watson*, B. The Court, however, entertaining some doubt on the question, directed that the case should be re-argued by one counsel on each side. And accordingly *Mellish* argued for the plaintiff, and *Grove* for the defendant, in Trinity term (May 22nd), before *Pollock*, C. B., *Martin*, B., *Bramwell*, B. and *Watson*, B.

Arguments for the plaintiff. The jury found that the testator tore his will *animo revocandi*, and it must be taken that the deceased did everything which he thought necessary to revoke his will. Perhaps the tearing of a word is not essential, but a word, and that an important word, was torn in the present case. By the Statute of Frauds, 29 C. 2, c. 3, s. 6, no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall &c., be revocable, otherwise than by some other will, &c., "*or by burning, cancelling, tearing or obliterating the same*" by the testator himself, or in his presence and by his directions and consent. The language of the 1 Vict. c. 26, s. 20, is not the same; its words are "*by the burning, tearing or otherwise destroying the same* by the testator." The question is whether in point of law the tearing is sufficient to revoke the will. It is not contended that a slight tearing would be evidence of an intent to revoke the will; but that, if the will is torn at all, evidence is admissible to shew with what intent it was torn. The word "tearing" has a plain meaning which is not affected by the subsequent words "otherwise

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destroying:" *Rex v. Taylor* (a). It is a rule of construction, that though the sense of *general* words may be narrowed by particular words following them; yet the sense of *particular* words shall not be limited by reference to general words following them. In *Williams on Executors*, p. 121 (b), it is said that there seems no reason why the decisions as to what was a sufficient burning or tearing under the old statute should not be applied to the new Statute of Wills. In *Bibb d. Mole v. Thomas* (c), the Court said that under the Statute of Frauds "Revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation. The statute has specified four of these, and if these or any of them are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. It is not necessary that the will or instrument itself be totally destroyed or consumed, burnt or torn to pieces." And accordingly they held a slight tearing, coupled with evidence of intent to destroy the will, a sufficient revocation. The case of *Doe d. Perkes v. Perkes* (d) did not turn on the question of the sufficiency of the act done to revoke the will, but on the ground that the act of the testator was incomplete, inasmuch as he had not done all that he intended to do. In *Doe d. Reed v. Harris* (e) the envelope alone was singed; no part of the will or of the paper on which it was written was burnt. [Pollock, C. B.—To hold that the intention to revoke by burning without any actual burning was sufficient, would be to treat it a question of intention alone.] *Patteson, J.*, in referring to the case of *Bibb d. Mole v. Thomas* (c) said:

(a) *Russ. & Ry.* 373.

(d) 3 B. & Ald. 489. See also

(b) 5th Edition. See also 1  
*Jarman on Wills*, p. 118, 2nd  
 Edition.

*Elms v. Elms*, Court of Probate,  
 July 26, 1858.

(e) 6 A. & E. 209.

(c) 2 W. Black. 1043.

"The testator is described not as having merely done something to the corner of the will, but as having given it something of a rip with his hands, and so torn it as almost to tear a bit off. \* \* \* There must be at all events a partial burning of the instrument itself; I do not say that a quantity of words must be burnt; but there must be a burning of the paper on which the will is." No case will be found in which, where an intention to revoke has been proved, any tearing done with that intent has been held insufficient. [*Bramwell*, B.—Your argument is that the decisions under the old Act are still applicable. Looking at the word "otherwise" in the 1 Vict. c. 21, s. 20, does it not assume that the tearing there spoken of must be a destructive tearing? Does it not mean, "by other ways" destroying?] *Hobbs v. Knight* (a) has no great bearing on this question: it is clear that cutting off the signature was a destruction of the will; and it was not necessary to consider how much less would have been sufficient. In *Clarke v. Scripps* (b) Sir John Dodson said: "If in doing the act, whether burning, tearing, or destroying the whole or a part, the testator should declare that he did so with the intention to revoke, there would be the act and intention; to whatever extent the act was carried, if he declared that it was his intention thereby to revoke the instrument, that declaration coupled with the act would be sufficient." In *Lambert's Case* (c) and many others, which will be relied on by the defendants as to the insufficiency of the tearing, there was no proof of any intention to revoke beyond the fact of the will being found torn. It will be contended that the seal is not a material part of the will, and therefore that tearing off the seal is not a tearing of the will. Now, though it is true that, except in execu-

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(a) 1 Curt. Eccl. 768.

(b) 2 Rob. Eccl. 563.

(c) 1 Notes of Cases, 131.

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tion of a power, a seal is never necessary, yet here the will is, on the face of it, described as a sealed instrument. That fact was relied on in *Lambell v. Lambell* (a), where a will, found in the deceased's repositories with the seal cut off, was presumed to be revoked. Cutting off the seal was said by the Court to be the common mode of revoking. *Davies v. Davies* (b) is to the same effect. It is true that these were wills of *personalty* and therefore not within the Statute of Frauds. In *Hyde v. Hyde* (c) it was proved that, by tearing off the seals, the testator did not intend to revoke. In *Onyons v. Tryers* (d) it was admitted that tearing off the seal might have been an effectual revocation of a will under the Statute of Frauds. [Martin, B.—If a man puts a seal on a will, he means to attest it in the most solemn way. The tearing off the seal is surely strong evidence that he means to destroy the will.] In *Bigge v. Bigge* (e), where a will was found in two pieces, and the question was whether the Court would presume an intention to revoke it, Sir H. Jenner Fust said: "If the testator intended to revoke the instrument, he would have removed all doubt by tearing off the seal and erasing the names of the witnesses." If it be material that some part of the writing of the will should be torn, that requirement is satisfied because an important word is torn. But it is submitted that it is enough if the entirety of the will, as it was made by the testator, is destroyed. To use the language of Coleridge, J., "such an injury, with intent to revoke, destroys the entirety of the will; because it may then be said that the instrument no longer exists as it was."

Arguments for the defendant.—There is a material and intentional difference between the language of the 6th

(a) 3 Hagg. 568.

(b) 1 Lee Eccl. Rep. 444.

(c) 1 Eq. Ab. 409.

(d) Prec. Chan. 459.

(e) 3 Notes of Cases, 601, 605.

section of the Statute of Frauds and the 20th section of 1 Vict. c. 26. The intention of the latter statute is to make it necessary that, in order to revoke a will, an act should be done the nature of which would be apparent on the face of the will. [*Watson*, B., referred to *Doe d. Strickland v. Strickland* (a).] By the 21st section, no alteration of the will is to have any effect, unless such alteration be duly executed, except so far as the words or effect of the will before such alteration shall not be apparent. [*Pollock*, C. B.—Section 21 does not appear to me to have any necessary connection with section 20. It permits a person who wishes to alter his will to do so, by making a part illegible without re-executing it.] What is a sufficient tearing is not a question of fact to be left to a jury. The words *burning or tearing* are used in addition to the word *destroying*, to shew that the legislature meant an actual destruction of the will. It is not contended that absolute physical destruction or annihilation of the matter of the will is necessary, but only something which destroys it as a will. The words are, not “burning, tearing or destroying” but “or otherwise” destroying. The word “otherwise” connects the word “destroying” with “burning and tearing.” Accordingly, since the statute, cancelling with intent to destroy has been held not to be “destroying:” *Stephens v. Taprell* (b). No symbolical destruction, such as cutting off the seal, is now sufficient to revoke a will: there must be a destruction of a *material* and *essential* part of the will. That was evidently the opinion of Sir *H. Jenner Fust* in *Hobbs v. Knight* (c). A will found mutilated must be presumed to be revoked: *In the goods of Lewis* (d). But if any tearing, however slight is sufficient to satisfy the statute, any torn will must be presumed as a matter of law to be revoked. [*Bramwell*, B.—

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(a) 8 C. B. 724.

(b) 2 Curt. 458.

(c) 1 Curt. 768.

(d) 1 Sw. &amp; Tr. 31.

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The plaintiff contends that an act done may be sufficient to revoke a will, which of itself would not raise a presumption of an intention to revoke.] In *Clarke v. Scripps* (a) the signature at the end of the will had been torn off; but in *Roberts v. Round* (b) the tearing off signatures from other sheets of the will was held not sufficient to revoke it, such signatures not being of the essence of the will. The case of *Bibb d. Mole v. Thomas* (c) was doubted by Lord Denman in *Doe d. Rees v. Harris* (d), and Coleridge, J., does not appear to have assented to the suggestion of Patterson, J., as to the "burning of the paper on which the will is." At the time when that case was decided, a symbolical destruction might have been sufficient. Since the 1 Vict. c. 26, that is no longer so. All that can be said of the will now in question is, that a part of it, not material to its validity, has been erased.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action of ejectment brought by the heir at law against the devisee under a will.

The cause was tried before Mr. Justice Crowder at the Summer Assizes for Brecon, when a verdict was found for the plaintiff, with liberty for the defendant to move to enter a nonsuit or verdict for the defendant, on the ground that the act done by the testator in order to revoke his will was not sufficient within 1 Vict. c. 26, s. 20. Mr. Grove accordingly obtained a rule for that purpose in Michaelmas term. Cause was shewn on the 10th and 11th of February at the sittings out of term. But as the Court was not then full, and the question turns upon the meaning of the new

(a) 2 Rob. Ecol. 563.

(b) 3 Hagg. 548.

(c) 2 W. Black. 1043.

(d) 6 A. & E. 209; see p. 215.

Statute of Wills on the subject of a revocation, and the language of the 20th section of the 1 Vict. c. 26, differs from that of the 6th section of the Statute of Frauds, and is to receive a judicial construction as to this (we believe) for the first time; the Court directed a second argument, which took place on Saturday last.

At the trial the jury found that it was the intention of the testator to revoke his will, and what he did was with that object. The will itself was on one sheet of paper, forming two leaves with four pages, and was executed in this form:—"And in witness hereof I have to this my last will and testament, contained in four pages, set my hand and seal, that is to say, to the first three pages hereof I have set my hand, and to the last page I have set my hand and seal: this, &c. Charles Price. (L. s.)." And the attestation stated it to be "signed, *sealed*, published," &c. The testator in order to revoke it tore off the seal, tearing with the third leaf (on which in the fourth page the seal was placed) a similar portion of the first leaf on which were the letters "ral," being the final syllable of the word "funeral." The question is, whether this was a sufficient "tearing" within the meaning of the 20th section of the 1 Vict. c. 26, the words of which are—"by burning, tearing or *otherwise destroying* the same" (*i. e.* the will). It was admitted that the word "destroying" did not import physical destruction; but Mr. *Grove* contended that the change of expression in the new statute ("*cancelling and obliterating*" being left out, and "*otherwise destroying*" being introduced instead,) imports that some act must be done so far destroying the will as to raise in itself a presumption (independent of other evidence) of an intention to revoke, and that merely tearing off the seal is not such an act, inasmuch as a seal is not at all essential to a will.

Very little assistance is to be derived from the previous

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cases in construing the altered expression in the statute. There can be no doubt that prior to the new statute a will found in the testator's possession with the seal torn off was deemed to have been cancelled: *Davies v. Davies* (a), *Lambell v. Lambell* (b). At that time any tearing done with the intention of revoking had been held sufficient. The expression upon which we have now to put a construction is "by tearing or otherwise destroying;" and as it was admitted (and we think could not be denied) that actual destruction was not necessary, it becomes a question of degree, whether what was done in this case was sufficient; and in such cases, and indeed in all similar cases we think it would be discreet not to lay down any general rule applicable to cases and circumstances which have not been the subject of argument before us, but to confine our judgment to the case at bar. And in our opinion as this will professed to be executed under seal, and was published and attested as a sealed instrument, when the seal was torn off it ceased to be the instrument which the testator professed to execute and to publish to the attesting witnesses, and through them to the world. It was, to use the expression of Mr. Justice Coleridge in *Doe d. Rees v. Harris* (c), "destroyed in its entirety," and ceased to be (by means of tearing) the instrument as and for which it had been published. We are therefore of opinion that the act of tearing in this case was sufficient, and that the will was thereby revoked, and the rule to enter a nonsuit or verdict for the defendant must be discharged.

Rule discharged.

(a) 1 Lee Eccl. Rep. 444.

(b) 3 Hagg. 568.

(c) 6 A. & E. 209.

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**T**HE first count of the declaration stated, that certain lands were in the occupation of certain persons as tenants thereof to the plaintiff, the reversion thereof belonging to the plaintiff: yet the defendants wrongfully broke and entered into the said lands under the surface thereof, where there were seams and veins of coal and other minerals; and dug out and carried away from the said lands large quantities of coal and other minerals; and also large quantities of stone, earth, and soil being thereon, &c.; by means of which premises the plaintiff has been injured in his reversionary estate and interest.—There were other counts not material to the present question.

The defendants pleaded (*inter alia*) fourthly, to the first count.—That in the year 1722, one R. Parkes was seised in his demesne as of fee of and in the lands herein mentioned and the coal and other minerals under the same; and by an indenture made the 16th May in that year, between R. Parkes of the one part and one J. Butler of the other part, sealed, &c.; R. Parkes for and in consideration of 60*l.*, &c., granted, bargained, sold, &c., to J. Butler a piece of land or pasture ground (describing it), together with all ways, &c., saving and excepting out of the said indenture all mines of coal and stone that were, should, or might be had and found in and upon the premises thereby granted or any part thereof; with free liberty of ingress, egress, and regress to and for R. Parkes, his heirs and assigns, to work the said mines, and to have, take, and carry away the produce thereof, and to do every other thing requisite and convenient to be done upon the premises for

If a party interrogated, under the 51st section of The Common Law Procedure Act, 1854, as to whether he has in his possession any deeds or writings relating to the lands in dispute, answers on oath that he has, but that such deeds relate exclusively to his own title to the lands, and do not shew any title in the opposite party, he cannot be compelled to state the contents of the deeds or to describe them, his oath as to their effect being conclusive.



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the purpose of working the said mines, and for taking and carrying away the coal and stone that should be there got; the said R. Parkes, his heirs, &c., filling up all pits, &c., and paying to J. Butler 4*l*. for every acre of the premises where they should so work: habendum to the use of J. Butler, his heirs and assigns, for ever. (Then followed covenants by R. Parkes to pay the 4*l*. per acre and fill up pits).—Averments: that the lands in the first count mentioned are parcel of the lands so conveyed by R. Parkes to J. Butler: that at the times in that count mentioned the plaintiff claimed to be and was entitled to and interested in the said lands as therein mentioned, from and under J. Butler, his heirs, &c., and that the defendants then claimed to be and were entitled to all the mines of coal and stone under the said lands from and under R. Parkes, his heirs and assigns, together with all such powers, rights, and privileges as in and by the said indenture were excepted and reserved to and in favour of R. Parkes, his heirs and assigns, &c. That the defendants being so entitled to the mines did, at the time in the first count mentioned, work the same and carry away the produce thereof in a reasonable, careful, skilful and proper manner, and necessarily and unavoidably dig out and carry away in manner aforesaid certain small quantities of stone, earth, and soil, &c.; the defendants being always ready and willing to perform all things which according to the said indenture were to be performed by the heirs, executors, &c., of R. Parkes on the occasion of their working and carrying away the produce of the mines under and in pursuance of the exception and reservation therein contained.

The plaintiff having joined issue, the defendants applied to a Judge at Chambers, under the 51st section of the Common Law Procedure Act, 1854, for leave to administer to the plaintiff the following interrogatories:—

“ 1. Have you in your possession, power, or controul any

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deeds or writings relating to the lands mentioned in the first and second counts of the declaration delivered in this cause, or any of them, or any part thereof? If so, state the number of such deeds and writings, and the dates thereof, and the parties thereto.

"2. Have you in your possession, power, custody, or controul any other deeds or writings relating to the above mentioned lands, or any of them, or any part thereof, other than the deeds or writings in your answer to the first interrogatory?

"3. Had you, or had to your knowledge or belief any former owner of the said lands or any of them, or any other person, at any time in his or their possession or controul any deed or deeds, writing or writings, relating to such lands, or any of them, which are not mentioned in your answers to the above interrogatories? Or has any person now, to your knowledge or belief, the possession or controul of any deed or deeds, writing or writings, relating to such lands, or any of them, which are not mentioned in such answers? If yea, state where, according to the best of your knowledge or belief, such deed or deeds now are, or what has become of the same, and whether or not any of such deed or deeds have been, to your knowledge or belief, lost or destroyed by time or accident, or otherwise; and what are or were the dates of, and who are or were parties to, any deed or deeds to which your answer to this interrogatory may refer."

In support of the application, there were affidavits of the defendants, in accordance with the 52nd section of the statute, and which, after deposing to the material facts in the above plea, stated that the defendants believed that the plaintiff had in his possession, or power, deeds and documents of title relating to the land in the declaration, and which would prove affirmatively the defendants' title to the

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mines and minerals under the lands, and to win and work the same.

*Bramwell*, B., before whom the summons was heard, made an order accordingly; and the interrogatories having been administered, the plaintiff answered them by affidavit as follows:—

“I have in my possession, power, custody, and controul, divers deeds and writings relating to the lands mentioned in the first and second counts of the declaration, but I abstain from stating the number thereof, the dates thereof, and the parties thereto, being advised that I am not bound, and that the defendants have no right to call upon me, to state the same, for the reasons and under the circumstances after mentioned; and being also advised that the first interrogatory itself is immaterial and irrelevant and merely fishing, and is otherwise objectionable in point of law, and I humbly submit that I am not bound to make any further or other answer thereto.

“I had not, nor to my knowledge or belief had any former owner of the lands or any of them, or any other person, at any time in his or their possession or controul any deed or deeds, writing or writings, relating to such lands or any of them, other than those which are now in my possession, power, custody, and controul as aforesaid; and no person has now, to my knowledge or belief, the possession or controul of any deed or deeds, writing or writings, relating to such lands or any of them, saving myself, who has such possession and controul as aforesaid.

“I say that such deeds and writings so in my possession, power, custody, and controul as aforesaid are title deeds and evidences of my title to the lands; and that they do not, nor do any, nor does either of them, give to the defendants or any of them, or shew in them or any of them, any title to the lands or any of them, or any part

thereof, or furnish evidence of any title or right of the defendants, or any or either of them, to the said lands or any part thereof, but the same relate exclusively to my own case in the action and constitute my title to the said lands and all the evidence thereof. I further say that my title to the lands was derived under persons who were purchasers of the said lands for valuable consideration actually paid, and who had not, to the best of my belief, notice of the alleged or any title or right of the defendants or any or either of them, or of any person or persons through whom they or any or either of them claim or allege to claim."

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*Quain*, in last Easter Term (May 8), obtained a rule calling on the plaintiff to shew cause why an oral examination of him should not be directed, or why he should not file a better answer to the interrogatories.

*Gray* and *Druce* now shewed cause.—The question turns on the construction of the 51st and 53rd sections of The Common Law Procedure Act, 1854. It is conceded that it was the proper course to order the interrogatories to issue, leaving the plaintiff to make his objections at the time of interrogation. That is the course pursued in equity, and approved of by this Court in *Osborn v. The London Dock Company* (a). It is submitted, however, that the plaintiff is not bound to answer these interrogatories, because they call on him to disclose his title deeds. In *Pickering v. Noyes* (b), the Court said: "Parties are never compelled to produce their title deeds. If a subpoena duces tecum is served, the party must bring his deeds into Court in obedience to the subpoena; but if he states that they are his title deeds, no Judge will ever compel him to produce them." The same rule prevails in Courts of equity:

(a) 10 Exch. 698.

(b) 1 B. &amp; C. 262.

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*Sutherland v. Sutherland* (a). The foundation of this proceeding is the 14 & 15 Vict. c. 99, s. 6, which empowered Courts of common law "to compel the opposite party to allow the party making the application to inspect all documents in the custody or under the controul of such opposite party relating to such action," &c., "in all cases in which previous to the passing of that Act a discovery might have been obtained, &c., in a Court of equity." This power was extended by the Common Law Procedure Act 1854, the 51st section of which enables a plaintiff or defendant to deliver to the opposite party "interrogatories in writing upon any matter *as to which discovery may be sought*." The question, therefore, is whether a Court of equity would compel a discovery of these documents. Now, the right of a plaintiff in equity to discovery is limited to such material facts as relate to the plaintiff's case, and does not extend to evidence which relates exclusively to the defendant's case: Wigram on Discovery, p. 261: Daniell's Chan. Prac. p. 954, 3rd ed. The rule is thus stated by Lord Brougham, C., in *Bolton v. The Corporation of Liverpool* (b): "A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title, and which form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary." The same doctrine is laid down in *Clegg v. Edmondson* (c). (*Phipson*, who appeared to support the rule, stated that what was sought for was, not an inspection of the deeds, but a schedule of the dates and names of them, according to the practice in equity when answering a bill of discovery; the object being to ascertain whether the plaintiff derived his title from J. Butler, who

(a) 17 Beav. 209.

(b) 1 Myl. &amp; K. 88.

(c) 22 Beav. 125.

was a party to the deed of 1722.) That proceeds on a mistaken notion of the practice in equity. Formerly, the documents were set out in extenso in the answer; but that practice having been found inconvenient, they are now merely scheduled by names and dates: Wigram on Discovery, p. 199, § 285. The principle, however, remains unaltered, and a party is not bound to schedule a deed unless under the old practice he was bound to set it out. In Wigram on Discovery, p. 313, § 395, it is said: "The question as to the plaintiff's right to the production of a deed (in the circumstances of a case like *Hardman v. Ellames* (a),) and his right to have it set out in the answer, are identical. The one is a mere *substitute* in practice for the other." The rule in equity is, that a party seeking a discovery which he has no original right to demand, and which the opposite party may by answer refuse to give, as being exclusively his evidence, is bound by his oath: Wigram on Discovery, p. 359, § 439. The onus is on the party to prove his right to see the deeds, and the Court will not make an order for their production, unless the opposite party admits his possession of them: *The Princess of Wales v. The Earl of Liverpool* (b): Wigram on Discovery, p. 208, § 293. The mere fact that the deeds relate to the plaintiff's title may not be a sufficient ground for refusing an inspection, but it is otherwise where on oath that fact is coupled with the fact that they do not in any way relate to the defendant's title. The oath of the party is conclusive, except where there is a direct or indirect admission of relevancy: Wigram on Discovery, pp. 217, 218, §§ 301, 302. [*Pollock*, C. B.—Where a witness swears that he cannot answer a particular question, without subjecting himself to a criminal prosecution, it would seem that the Judge is bound by his

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(a) 2 Myl. &amp; K. 758.

(b) 1 Swanst. 123.

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oath. In *Fisher v. Ronalds* (a), *Maule, J.*, expressed an opinion to that effect.] *Reynell v. Sprye* (b) is an authority that the oath of the party is conclusive. In *Wigram on Discovery*, p. 237, § 317, it is said : "The great difficulty which the Court is sometimes under in refusing to make an order for the production of documents, arises from the consideration that it is giving final effect to the oath of the defendant (the interested party) upon the plaintiff's right to discovery—a difficulty which is increased by the observation, that from the nature of documentary evidence, the defendant may be swearing to that which is rather matter of law than of fact, or, at best, a mixed question of law and fact. The whole of the plaintiff's case may hinge upon a point like this. On the other hand it must be observed, that in refusing to make an order for the production of a document, a Court of equity deprives the plaintiff of no evidence to which the law entitles him, and which he can obtain without the aid of a Court of equity . . . . The oath of the defendant *must* be received, or the defendant must be without *the means of* a defence which in truth belongs to him—a proposition too absurd for argument." To entitle a party to an order for the production of documents, two things are necessary: the opposite party must admit his possession of or a power over the documents, and he must describe them: *Wigram on Discovery*, p. 209, § 294. The answering interrogatories rests on the same principle as the production of documents: *Swinborne v. Nelson* (c). The party interrogated is not bound to describe the deeds in a schedule; but the objection to produce them may be raised by plea or demurrer. Here the defendants justify a trespass by a claim to certain mines, whereas

(a) 12 C. B. 762.

(b) 1 De Gex, M'N. &amp; G. 656.

(c) 16 Beav. 417.

the interrogatories do not point to the mines, but only to the plaintiff's title to the surface land.—They also referred to *Adams v. Fisher* (a).

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*Phipson* and *Quain*, in support of the rule.—It is conceded that at common law a party to a suit was not bound to produce his title deeds, but the exemption did not extend to any other documents. The object of these statutes was to put an end to that distinction, and to give to Courts of law all the powers of Courts of equity with respect to discovery. In *Wigram on Discovery*, p. 199, § 284, it is said—"The right of a plaintiff to discovery is not confined to a discovery of facts resting merely in the knowledge of the defendant, but extends *primâ facie* to a discovery of *deeds, papers, and writings* of every description in his possession or power, the contents of which may be material to the proof of the plaintiff's case" (b). Therefore, assuming a deed to be relevant, there is no distinction in this respect between a deed and any other document. In *Doe d. Avery v. Langford* (c) *Erle, J.*, said: "The privilege of not producing a title deed is now put an end to whenever the deed makes out the opponent's title." The rule in equity is, that a party can only ask for an inspection of the title deeds of the opposite party if he shews a *primâ facie* case for discovery, and the opposite party admits their relevancy and that they are in his possession or power. The scheduling the deeds and the producing them are different things, and if the relevancy is admitted the opposite party will be entitled to have the deeds described, though he may not be entitled to their production: *Wigram on Discovery*, p. 211, § 295. The description is essential in order to enable the Court to

(a) 3 Myl. &amp; C. 526.

(b) *Redes. Plead.* 53.

(c) 21 L. J., Q. B. 217.



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judge of their effect and decide whether they ought to be produced: Hare on Discovery, p. 230. In Wigram on Discovery, p. 239, § 318, it is said: "As a general rule, it may perhaps be stated that the defendant, in order that he may entitle himself to the protection he claims, must give the Court the best means he can of judging of the truth of what he swears to, short, of course, of that discovery which he is desirous of withholding; that is, he must claim protection by means of the best evidence the nature of the case admits of. A mere general assertion that all the documents in the defendant's possession are evidence exclusively of his own case, *without describing them*, might not, perhaps, in some cases, though in others it clearly would, be sufficient. A description of the documents, however, coupled with the same averment would, probably, in all cases be sufficient, unless, from the nature of the documents or other circumstances appearing in the answer, the Court found reason for discrediting the answer or refusing to give effect to it. The nature and extent of the averments must determine a question like this." Also, if the relevancy is admitted, the party cannot protect himself against an order for producing them merely by denying their effect, for the opposite party has a right to judge of that: Wigram on Discovery, p. 217, § 300. The principle is thus explained by Lord Cranworth, V. C., in *Goodhall v. Little (a)*: "The plaintiffs assert a title which the defendants deny. The defendants admit that they have in their possession documents relating to the matters in the bill mentioned. Some of the matters in the bill mentioned are the facts from which the plaintiffs shew, or allege they shew, a title. The documents in question relate, or, for anything that appears in the answer, may relate, to those very facts. The defendants, it is true,

(a) 1 Sim. N. S. 155, 161.

say that the documents would not shew the facts to be as the plaintiff alleges them to be. But that is the very point in issue. The documents relate to the point. What is the true result of them is the matter to be decided. It may be true, as stated by the answer, that by the documents, that is by them alone, the truth of the plaintiffs' case would not appear. But they may form material links in the chain of proof: and, at all events, as it is admitted that they relate to the matters in dispute, the plaintiffs, unless there be some other objection, are entitled to see them in order to form their own opinion as to whether they do or do not make out, or help to make out, their title." Here, the defendants do not ask for the production of the deeds, but only whether the plaintiff has them in his possession. In *Lloyd v. Parves* the information sought for would not have assisted the party applying for it. At all events, the plaintiff's answer is ambiguous and evasive.

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POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. Ambiguity has arisen from the word "relevancy" being used in different senses, whereas, if it always had the same meaning, the obscurity which surrounds this question would be removed, and it would be evident what rule ought to be laid down. There are some analogous cases in the law which furnish us with assistance on the present occasion, and all of which point to the same conclusion. One is that of a witness who protects himself from answering a question tending to criminate himself; and certainly I have always thought that the law on that subject was correctly stated by *Maule, J.*, in the case of *Fisher v. Ronalds* (a). He there said, in the course of the argument: "It is the witness who is to exercise his discretion, not the Judge. The witness might be asked, 'Were

(a) 12 C. B. 762.

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you in London on 'such a day?' and, though apparently a very simple question, he might have good reason to object to answer it, knowing that, if he admitted that he was in London on that day, his admission might complete a chain of evidence against him which would lead to his conviction. It is impossible that the Judge can know about that. The privilege would be worthless if the witness were required to point out how his answer would tend to criminate him." The course of administration of the law in this country has always been, never to compel a witness to answer a question which has a tendency to criminate himself. This is considered so sacred a principle that the right of a plaintiff or defendant in a civil suit is taken away by it, however important the testimony may be, even though it might establish his title to an estate or interest ever so large. Doubts have arisen as to the extent to which the privilege may be carried, and whether there are any limits to the protection of a witness. The only exception I know of is this,—where the Judge is perfectly certain that the witness is trifling with the authority of the Court, and availing himself of the rule of law to keep back the truth, having in reality no ground whatever for claiming the privilege, then the Judge is right in insisting on his answering the question. But it would be very inconvenient to lay down as a rule, that the party questioned is bound to go so far as to satisfy the Judge that the answer to the question might criminate him. In disclosing the source of danger he might place himself in peril, and cause the very mischief which the law meant to prevent. It appears to me therefore that the law is as pronounced by *Maule, J.*, in *Fisher v. Ronalds*; and, although some doubts may have been expressed as to the correctness of his view, I do not find any conflict of decision on the subject. In the case of *Fisher v. Ronalds* the other Judges did not state the rule so

broadly ; none of them, however dissented from it. *Williams*, J., gave a judgment quite sufficient for the purposes of the case before him, saying that he thought it abundantly clear that the answer of the witness must have a direct tendency to place him in danger ; but he declined saying who is to judge whether that is so. It is impossible to satisfy the Judge without exposing the whole matter ; and a man may be placed under such circumstances with respect to the commission of a crime, that if he disclosed them he might be fixed upon by his hearers as a guilty person ; so that the rule is not always the shield of the guilty, it is sometimes the protection of the innocent, although very likely it was originally introduced from humane motives, being probably derived from the maxim "*nemo tenetur seipsum accusare.*"

Such being the rule, we are enabled to come to a just conclusion with respect to the proposition which the plaintiff's counsel so ably advocated. That proposition is, that if a plaintiff or defendant has deeds in his possession, and says that they do not relate to the title of the opposite party, but solely to his own, then the opposite party has no right to say, "I should like to be satisfied of the fact myself ; I doubt whether you entertain a correct view of the meaning of the documents, or are quite honest in your representation of their nature." If the information respecting them can be obtained, the mischief is done—the opposite party would acquire some knowledge which he is not entitled to. Moreover, the answer might enable some one else to take proceedings, and thus a person might lose his estate. The distinction between title deeds and other things is in a great measure dependant on the dogma which makes every man's house his castle, and attaches such importance to the protection of property in land. The distinction which the law has at all times made between real property and

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personal property may in part have arisen from this:—that if a man has land he is considered as holding it under a grant from the Crown; if he has personal property he holds it directly or indirectly by reason of some contract. The rule that a man shall not refuse to answer, because the answer would subject him to a civil suit, has long prevailed; for, though at one time there was considerable difference of opinion on that point, the matter was finally settled by the 46 Geo. 3, c. 37, which established the broad distinction in this respect between civil suits and criminal proceedings.

To apply these remarks to the case now before us:—The question is, whether the plaintiff is bound to produce his title deeds. To compel him to do so would introduce a new rule, which certainly was never intended by this act of parliament, and would render a title deed of no more importance than a bill of exchange or any other written document. I think that a man's title deed is still protected unless it tends to prove the case of the opposite party; if it does not, it is irrelevant. The recent changes in the law have made no alteration in that respect. There is a power to call for documents: first, one party may inquire whether the other has in his possession or power any documents relating to the matters in dispute; that means, "Have you any documents which I am entitled to see? If so, state them, and then I will call for them." If the party interrogated says on oath, "I have no such documents; you have no right to know how many deeds I have in my chest, but I swear that I have no documents which relate directly or indirectly to the matters in dispute," then the other party has no right to inquire any further. That is in accordance with the right of search in other cases. After a dissolution of partnership, one of the partners may have in his possession a book which the other wishes to inspect. The latter has a right to see such portions of the book as relate to matters

in which he is concerned; but he has no right to see the rest. Then the book is produced with those parts sealed up. But how is that determined? By the oath of the party. Such has always appeared to me to be the law, and I think that after this discussion it will no longer be looked upon as uncertain.

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MARTIN, B.—I am also of opinion that the rule ought to be discharged. I am glad that this discussion has taken place, for it has afforded much information on a subject somewhat difficult to deal with. My opinion is founded on the consideration that the defendants had no right to put to the plaintiff the questions, the answers to which are complained of; and that these interrogatories ought to have been disallowed, as I think they would have been if put in a bill in equity and demurred to. I think that if the proper questions had been put, the answers here given would have been evasive; but they were not put, and those which were ought not to have been allowed.

The facts are these:—In answer to a declaration in trespass the defendants say, they are entitled to the minerals below the land, the surface of which belongs to the plaintiff: they say further, that their title is derived from a person named Parke. Now, they had a right to interrogate the plaintiff as to whether he had in his possession any documents which would be evidence that they are entitled to the minerals; and according to the authority of *Sir James Wigram*, title deeds stand on the same footing in this respect as any other documents. The proper question would be: "Is there anything in the title deeds which you hold of this land, which shews that the minerals do not belong to you; but to me?" The plaintiff would be bound to give a direct answer to that interrogatory. If he said, "I have title deeds relating to the land of

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which I am in possession, but there is nothing in them to shew that you are entitled to the minerals," there would be an end of the matter; according to the authorities, and especially that of *Reynell v. Sprye (a)*, where, although it appeared that the answers were false, Lord Justice *Knight Bruce* would not depart from the settled practice, but acted on the answers as final, leaving the opposite party to any redress he could find. In the present case, however, the plaintiff is not asked the question he might have been asked, but only whether he has in his possession any deeds relating to the lands in question, which *primâ facie* means the lands, as distinct from the minerals. As therefore the defendants have not asked directly about the minerals, they cannot complain of the plaintiff having answered evasively a question that was never put. There is, indeed, another question which I think might have been put, and which the plaintiff would have been bound to answer, viz.: "Do you claim under a conveyance from Parkes anterior to that under which we claim?" I am not aware of any other questions which could be put except those two; but certainly the questions which were put were not admissible. The party interrogating ought to put direct questions, and then the other party must answer them; and not put general questions which only bring general answers.

BRAMWELL, B.—I am of the same opinion. I have always thought that the right to administer interrogatories was confined to those matters in respect of which the party might have a discovery, and I do not understand that the defendants' counsel dissent from that; and it is difficult to see what it is they do affirm, and which they say gives them a right to more information in this case. One point

(a) 1 De Gex, M'N. & G. 656.

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made by them is something like this,—We do not ask for a discovery, but for a schedule of these deeds, and a schedule is no part of a discovery, because it is only some account of the deeds, in order to enable us to see whether we are entitled to a discovery. But I think that the plaintiff's counsel have shewn that giving a schedule of deeds is equivalent to a production of them. In former times, it seems to have been the practice in equity to set out the deeds in extenso, whereas now they are only described in a schedule. That shews to demonstration that the argument of the defendants' counsel cannot be true: and that where a party is not entitled to the production of a deed because it does not relate to his case, he is not entitled to a description of it. "But," say the defendants' counsel, "still it must be assumed to be something we are entitled to see so soon as it appears to be relevant." But "relevant" means evidence affecting the case of the party applying. Again, the defendants' counsel say that the answers of the plaintiff are evasive. The reply to that is, that they answer in the words of your questions, and you cannot complain of them for not answering more than the questions put. If you wanted more precise and particular answers, you should have put more precise and particular questions. I do not wish to determine what questions might have been put, but this question would not have been unreasonable—"I affirm that I have a title to the minerals through a former owner who granted away the surface and through whom you claim, is it true that you have any title deeds which prove that case?"

Watson, B.—I am of the same opinion. The authorities are clear, that a person is not entitled in equity to a discovery of title deeds unless they contain evidence of his own title. Neither is he otherwise entitled under the recent



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statute. Though he has a right to the discovery of title deeds, or any other writing material to his case, Sir *James Wigram* says (a)—“The exercise of a jurisdiction of this nature cannot be otherwise than pregnant with danger to the interests of those against whom it may be enforced, unless careful provision were made for guarding against its abuse.” The question whether a party has anything in his title deeds material for his adversary’s case, is always guarded in this way—“Have you title deeds, and *are they relevant?*” Relevant to what? To the matter of inquiry, viz., to the plaintiff’s title. Anything which shews a title in the opposite party is evidence for him, but when the party interrogated answers “I have certain deeds, but they relate exclusively to my own title,” he cannot be compelled to go any further: otherwise you might get at the title deeds of every person in the kingdom. The rule on this subject is thus summed up in *Taylor on Evidence*, vol. 2, p. 1436, 3rd ed.:—“As in all cases where a discovery of the contents of papers is prayed, the onus is upon the plaintiff to prove his right thereto, and the only evidence on which he can rely is the defendant’s admission; it follows that a court of equity will not make an order for inspection of documents unless the plaintiff can shew from the defendant’s answer, or from his affidavit in the nature of a supplemental answer, first, that the writings in question are in the possession or power of the defendant; and next, that they are relevant to his own case; or, in other words, that he has an interest in their production for the purpose of the trial about to take place, either as affording affirmative evidence of some right or title belonging to him, or as tending to disprove the title or case of his opponent, by shewing some specific defect therein.” Now let us see what took place here. These interrogatories are put in generalities. The first is, “Have you in

(a) *Wigram on Discovery*, p. 2, § 5.

your possession, &c., any deeds or writings relating to the lands mentioned in the declaration?" &c. For a long time I did not understand whether this interrogatory related to the mines, or to the surface land. But I now see what the object was—to do indirectly that which could not be done directly, viz., to get at the plaintiff's title deeds. The proper question would have been, "Have you any deeds or writings relating to the title to these mines?" The other interrogatories are open to the same objection. It was argued, however, that these interrogatories were put in these large and general terms in order that the defendants might get an account of the deeds and then call for their production; and that they have a right to say, "Although the plaintiff says that he has no deeds except those which relate exclusively to his title, we will not be content with his statement, but wish to see them and judge for ourselves." That is in fact an indirect mode of doing that which cannot be done by a bill for a discovery or under the provisions of this act of parliament. For these reasons I think that the rule ought to be discharged.

Rule discharged.

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May 27.

CORT v. SAGAR.

The plaintiff assigned to the defendant by bill of sale, "all and singular the 104 power looms and other effects and things belonging thereto, now being in, upon, or about the mill, particularly set forth in the schedule." The schedule was as follows:—Looms made by S." The looms were in use at the date of the execution of the bill of sale. Healds, reeds, weft and waste cans are attached to the looms when in use, and the looms are not complete for the purpose of weaving till they are supplied, but they form no part of the looms as they come from the makers. They are made and often sold at sales separately from the looms. Different healds and reeds are used in weaving cloth of different degrees of fineness; they do not ordinarily belong to any particular loom, but can be detached and used with any loom indifferently.—*Held*, that the healds, reeds, cans, &c., which were on the premises at the time of the execution of the bill of sale passed to the defendant.

**T**ROVER for healds, reeds, beams and weaving utensils and pieces of machinery for weaving, and articles belonging thereto, and strapping.

Plea.—That the goods were not the goods of the plaintiff.—Whereupon issue was joined.

At the trial, before *Martin*, B., at the Liverpool Spring Assizes, it appeared that the action was brought to recover certain healds, reeds, beams, oil cans and waste cans seized by the defendant. The plaintiff by indenture, dated the 4th of June, 1857, had sold and assigned to the defendant "all and singular the 104 power looms and other effects and things belonging thereto, now being in or upon or about the mill or iron foundry and premises late of one Thomas Cort, and more particularly set forth in the schedule at the foot or end hereof." The schedule was as follows:—

"In the top room of the mill.—Fifty-two power looms 8-8ths, 36 whereof made by T. Sagar, and 16 made by Dickinson.

"In the bottom room of the mill.—Fifty-two other power looms 8-8ths, also made by the said Thomas Sagar."

There were on the premises, but not actually attached to the looms, 55 sets of healds and reeds, 34 weft cans, 34 waste cans, 34 oil cans, 34 oil bottles, 15 spare beams, 30 brushes and 20 or 30 pounds of strapping. All these things were employed in weaving cotton; without them, in fact, the looms could not be used. The oil bottles are bolted to

the looms; but all the other things are capable of being detached, and were in fact detached, from the looms at the time of the seizure. The looms were all of the same size, and the articles in question were capable of being used with any loom. Looms, when supplied by a machine maker, are not fitted with healds, reeds, beams, waste, or oil cans or oil bottles, which are made separately and often sold at sales without the looms, but the looms are not complete for the purpose of weaving without them. Different healds and reeds are used for different qualities of cloth. They are set up and attached to the looms as required. The plaintiff had two sets for each loom: a set of 44s, which she was using when the bill of sale was executed, and a set of 48s, which were in use at the time of the seizure, and which had been purchased by her subsequently to the date of the bill of sale. The defendant took possession of the whole of these articles. The defendant stated that when the bill of sale was executed he saw that all the looms were complete: that, though prepared in May, it was not executed till the looms had been completed by attaching the articles in question. The jury found the value of the articles bought by the plaintiff after the date of the bill of sale to be 30*L.*, and the value of the healds, reeds, &c., seized, which were on the premises at the date of the bill of sale 20*L.* The learned Judge reserved leave to the defendant to move to reduce the verdict by 20*L.*

*Edward James* having obtained a rule accordingly,

*Overend* and *Rew* now shewed cause.—The schedule governs the construction of the deed, *Wood v. Rowcliffe* (a). The healds, reeds, &c., are not any part of the looms made by Sagar and Dickinson, which alone were intended to pass. The healds and reeds in no sense belonged to the looms; therefore, though the general words in the deed might be

(a) 6 Exch. 407.

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sufficient to pass them if they stood alone, yet, restricted as they are by the language of the schedule, they have not that effect. The case is analogous to that of *Hutchinson v. Kay* (a), where, by a mortgage of a mill and machinery belonging to the mill, looms not fixed but merely steadied in loom foots, were held not to pass. [*Pollock*, C. B.—In that case the conveyance was merely of the building and motive power.] These articles did not form part of any particular loom. It may be admitted that if a machine is conveyed with all things belonging to it, all those things which have been appropriated to that machine, and which are necessary to its working, would pass. Thus, if a barrel organ were conveyed the barrels would pass; or spare screws and oil cans in the present case. But if a man sells a cart and all belonging to it, harness would not pass. All that can be said of these healds and reeds is, that they belonged to the owner of the looms. [*Bramwell*, B.—You contend that “belonging thereto” means necessarily and permanently belonging thereto. The words “and used therewith” are not found in the deed.]

*Edward James* (with whom was *Joseph Kay*), in support of the rule.—The deed must be read so as to give effect to the intention of the parties. It was proved that they waited till the looms were fitted up, by the addition of the healds, reeds, &c., and were at work, before they executed the deed. “Looms” here means, not the mere framework, but all that is necessary for weaving. If the word “looms” is not sufficient to include these matters, the deed contains the words “effects and things belonging thereto now being in, upon or about the mill.” In *Bacon’s Abridgment*, tit. *Grant*, L. 4, it is said, “If a man grant his saddle with all things thereunto belonging, stirrups, girths and the like, do pass. So if a man grant his viol, the strings and bow

will pass" (a). So by a grant of a mill, cum pertinentiis, a kiln at the end of the close whereon the mill stood would pass if the kiln was necessary to the mill (b).—(They were then stopped by the Court).

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POLLOCK, C. B.—We are all of opinion that the rule must be absolute. The language of the deed in this case makes it clear to my mind that the words "all other effects and things belonging thereto now being in, upon or about the mill," were intended to include the healds, reeds and other matters of that kind.

MARTIN, B.—I am of the same opinion. Supposing the defendant desired to create a security by assigning the looms with the healds, reeds and cans, it is difficult to see how she could grant them otherwise than by language similar to that found here. The words of the deed are not satisfied unless these things pass. The schedule is merely for the purpose of identifying the looms, and does not limit the grant.

BRAMWELL, B.—I entertained some doubt during the argument in consequence of my want of acquaintance with the subject matter of the grant; but on consideration I am of opinion that the meaning of the words, "all effects and things belonging thereto" must be construed with reference to the extrinsic facts. The articles in question, though separate from the looms, were attached to them when the looms were in use, so that an ordinary observer would say that they belonged to the looms. A reasonable meaning would not be given to the language of the deed unless they were held to pass by it.

Rule absolute to reduce the damages (c).

(a) Citing *Price v. Braham*, *Northern Railway Company*, 14 Vaughan, 109. Q. B. 25; *Liford's Case*, 11 Rep.

(b) Citing *Archer v. Bennett*, 46 b, 50 b; *Wystow's Case*, 14 H. 8, 25 b; *Place v. Fagg*, 4 Man. & Ry. 1 Lev. 131.

(c) See *Regina v. The Great* 277; *Sheppard's Touchstone*, 90.

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May 25.

WALKER v. DAVIS.

A sheriff having been ruled to return a writ more than six months after the expiration of his office, the London agent of his undersheriff obtained an order for a week's further time to return the writ.—

*Held*, that obtaining the rule after six months was merely an irregularity, and that such irregularity was waived by obtaining the order for further time to return the writ.

**K**EANE had obtained a rule nisi for an attachment against John Samuel, Esq., late sheriff of the county of Glamorgan, for not returning a writ of fieri facias pursuant to a side bar rule obtained for that purpose on the 13th of November, 1857.

It appeared from the affidavits that Mr. Samuel was sheriff of Glamorganshire for the year 1856, and that the writ of fieri facias was received by the undersheriff on the 2nd of May, 1856, during the sheriff's year of office, which terminated on the 7th of February, 1857. Nothing was realized under it. On the 16th of November, 1857, the above mentioned side bar rule was received by the undersheriff, directed to the sheriff, and requiring him to return the writ within eight days after notice of the rule. An order for time to return the writ was, on the application of the London agent of the undersheriff, made by *Channell*, B., on the 20th of November, 1857. The undersheriff swore that this was done by his agent in London without his knowledge or that of Mr. Samuel. The clerk of the agent swore that he forwarded the rule to return the writ to the undersheriff, but not having heard from the undersheriff with the return within the time limited, upon his own responsibility he took out a summons for time to make the return, upon which the order was made. On the 20th of December the agent gave notice that no return was made to the writ. On the 27th of December a summons to set aside the rule to return the writ was taken out and heard before *Martin*, B., who dismissed it on the ground that the sheriff had waived the irregularity of the rule being

too late by obtaining an order for time. On the 11th of January, 1858, the order of *Channell, R.*, was made a rule of Court.

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*Milward* shewed cause in the first instance.—By the 20 Geo. 2, c. 37, s. 2, it is enacted that no sheriff shall be “called upon to make a return of any writ or process unless he be *required* so to do within six months after the expiration of his said office.” The word *required* means *required by rule*. Now a rule obtained after the expiration of the six months is a nullity. In *Watson on the Office of Sheriff*, p. 82, it is said: “It is reported to have been decided in one case that a sheriff under special circumstances might be compelled to return a writ though he had been *more than three years* out of office (*a*). But the statute, 20 Geo. 2, c. 37, was not adverted to.” The proceeding was altogether unwarranted and different from that which ought to have been taken; it therefore could not be made good by waiver: *Archbold's Practice*, by Chitty, 9th ed. 1376. Its effect is to render the late sheriff liable in respect of a matter from which the law had discharged him: *Clarke v. Smith* (*b*). Moreover, at the time of the service of the rule the agent of the undersheriff was *functus officio* as to matters of this kind, and could not waive an irregularity which it is not shewn that the sheriff intended to waive.

*Keane* appeared in support of the rule, but was not called upon.

POLLOCK, C. B.—We are all of opinion that the side bar rule cannot be treated as a nullity. While it remains in force it must be obeyed.

(*a*) Referring to *Wilton v. Chambers*, 3 Dowl. P. C. 333.

(*b*) 2 H. & N. 754.



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*Milward* then moved to set aside the side bar rule, and explained that the case had stood over from Easter Term by arrangement.

POLLOCK, C. B.—The application is too late. We ought not to grant a rule.

MARTIN, B., concurred.

BRAMWELL, B.—After an application for an extension of the time to return the writ we cannot set aside the rule.

Rule absolute, the attachment to lie in the office.

May 29.

BARNETT v. ALLEN.

The plaintiff and defendant being present in a public house where there had been a raffle, the defendant said "I am surprised at R. allowing a blackleg in this room." A witness being asked what he understood by "blackleg," said, "a person in the habit of cheating at cards." The question was objected to, but allowed. The Judge told the jury that if the plaintiff meant to charge the defendant with being a gambler simply the action would not lie, but if he meant to impute that he was a cheating gambler they would find for the plaintiff.

SLANDER.—The declaration stated that the defendant, contriving to injure the plaintiff, falsely and maliciously spoke of the plaintiff the words following:—"I am surprised Mr. Reynolds should allow a blackleg (meaning the plaintiff) in this room" (meaning that the plaintiff obtained his living by dishonest gambling, and was a professed gamester and a fraudulent gamester, &c.).

Plea: Not guilty.—Whereupon issue was joined.

At the trial before *Erle*, J., at the last Spring Assizes for the county of Kent, it appeared that the plaintiff and the defendant, who were tradesmen at Woolwich, had been

*Held*: (Per *Pollock*, C. B., and *Watson*, B.)—First, that it is not actionable without special damage to call a man a blackleg, because it does not necessarily mean a cheating gambler.

Secondly, that the evidence as to the meaning of the word "blackleg" was not admissible.

Per *Martin*, B., and *Bramwell*, B.—First, that, under the circumstances, it must be taken that the defendant did make use of the word with intent to convey to the minds of those present that the plaintiff was a cheating gambler, and that therefore the action was maintainable.

Secondly, that the evidence was admissible.

present at a public house called The Edinburgh Castle, kept by one Reynolds, where there had been a raffle in which both the plaintiff and the defendant had taken part. At supper, after the raffle, the defendant, referring to the plaintiff, said:—"I am surprised at Mr. Reynolds allowing a blackleg in this room." A witness named Rice was asked what he understood by "blackleg." The question was objected to by the defendant's counsel, but allowed by the learned Judge. The witness said, "I understood blackleg to mean a person in the habit of cheating at a particular game at cards." The learned Judge told the jury that if the words used were meant to imply that the defendant was a gambler, and nothing more, the action was not maintainable; but that if they imputed to the plaintiff that he was a cheating gambler they would find for the plaintiff. The jury having found a verdict for the plaintiff, leave was reserved to the defendant to move to enter a nonsuit.

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*Shee*, Serjt., in Easter Term, obtained a rule nisi accordingly, or for a new trial, on the ground that the words were not actionable, and that the evidence of the meaning of the word "blackleg," which was admitted by the learned Judge, was not admissible, and did not support the inuendo; against which

*Edwin James* and *Doyle* now shewed cause.—By the 8 & 9 Vict. c. 109, s. 17, persons cheating at play are to be deemed guilty of obtaining money by false pretences. Looking at the circumstances under which the words were spoken, and the fact that the parties had just been gambling, it cannot be supposed that the word was used in the sense that the plaintiff was a gambler simply. There can be no doubt that the intention was to charge him with being a cheating gambler. In 1 Hawk. P. C., bk. L, c. 71, s. 1, it is said that playing with false dice is indictable as a cheat at common law (*a*). There

(*a*) On this point they cited also 2 Roll. Ab. 78 (H.).

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was evidence that the word was understood as charging fraudulent gaming, and such evidence was properly admitted. [*Martin*, B.—Suppose the plaintiff was called by some slang term, such as “cracksman,” it could hardly be said that evidence of the sense in which the word was used would not be admissible.]—They also referred to *O’Brien v. Bryant* (a).

*Joyce*, in support of the rule.—The first question is, whether the inuendo was proved. The words not being actionable in themselves an inuendo was necessary. The Court cannot infer that an indictable offence was intended, because the expression is ambiguous: *Day v. Robinson* (b). In such a case, section 61 of the Common Law Procedure Act, 1852, does not render an inuendo unnecessary. Now, assuming the inuendo to be proved, no indictable offence is charged by it. It is consistent with it that the plaintiff may have obtained a living by cheating as a gambler abroad. It is therefore not actionable: *Sweetapple v. Jesse* (c). [*Martin*, B.—That case depends upon the old rules of pleading.] There may be dishonourable gaming, in respect of which a man may be called a blackleg, which is not fraudulent gaming, or punishable otherwise than by public opinion, as if an experienced and skilled gambler, “a rook,” persuades an inexperienced youth, “a pigeon,” to play with him, and then plucks him.

*POLLOCK*, C. B.—I am of opinion that this rule must be absolute. The question turns on whether it is actionable to call a man a “blackleg,” without proving special damage, I think it is not. No evidence was given at the trial in proof of the meaning of the word as alleged in the declaration, even if such evidence was admissible, which I

(a) 16 M. & W. 168.

(b) 1 A. & E. 554.

(c) 5 B. & Ad. 27.

think it was not. The word "blackleg" has been used long enough to be understood, not only by experts in slang, but by the public at large, and therefore it was for the Judge to expound its meaning. I have always understood the word "blackleg" to mean a person who gets his living by frequenting racecourses and places where games of chance are played; getting the best odds and giving the least he can; but not necessarily cheating. That is not indictable either by statute or at common law. It is, therefore, not more actionable to call a man a "blackleg" than it is to call him a "villain," a "cheat," a "swindler," or any other opprobrious term not necessarily imputing the commission of a particular crime. There are many expressions which, if applied to a man, would place him in a most odious light; but the law has judged that such words of heat ought not to be the subject of an action, unless they have a tendency to expose the person of whom they are spoken to peril; or unless they amount to slander of title, or slander in respect of his trade or profession. Except in these three cases, with respect to ordinary persons, words of this kind are not actionable without special damage. According to the definition in Webster's Dictionary, the word "blackleg" may be applied to a notorious gambler or cheat. To support the declaration, the meaning must be shewn to be a "gambling cheat" or "cheating gambler." Here there was no evidence that the word was used in a sense different from that in which it was ordinarily understood; though I doubt whether any evidence ought to change the meaning of a word so as to give it a worse sense than it has in its ordinary acceptance, unless it refers to a particular transaction. Here the evidence was that the defendant simply called the plaintiff a "blackleg," without reference to any other matter. The witness Rice was asked what he understood by the word "blackleg." That was not the proper question. If an expert is called

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in to explain a slang term, the proper question is, what is the general meaning of the term amongst those who are in the habit of employing it? Upon the general principle that a mere term of reproach is not actionable, I think that this action was not maintainable.

MARTIN, B.—I regret that any difference should exist in the Court on so trifling a matter. I always understood the rule to be, that words are actionable if they impute to the person of whom they are spoken an indictable offence, either on a particular occasion or habitually. By the statute 8 & 9 Vict. c. 109, cheating at cards is indictable; and the question is, did or did not the defendant use the word with intent to convey to the minds of the persons present the imputation that the plaintiff had habitually by fraud and malpractice won money? I should have so understood them, and that such was the defendant's meaning was proved by the evidence. The witness who was called said he considered the word "blackleg" to mean a person who plays at cards and cheats; it was therefore a question for the jury whether the defendant meant to impute to the plaintiff that he had been guilty of an offence for which he was liable to be indicted under the statute.

BRAMWELL, B.—I agree with my brother *Martin*. I construe the word "blackleg" in the same sense in which he does. In considering questions of this kind we have to ascertain, not exactly the sense in which words are understood by the hearers, but in what sense they would be reasonably understood. A person is responsible for the natural meaning of words uttered by him. If a word is properly an English word the Judge must interpret it. If it be slang, witnesses may be called to shew in what sense it is understood. I doubt whether the word "blackleg" is

English, or whether it is slang. If it is English, then I understand it as my brother *Martin* does; if it is slang, an interpretation has been put upon it by the evidence. I do not agree with the Lord Chief Baron in thinking that there was no evidence of its meaning. If it is English, the innuendo was unnecessary; if it is slang, the innuendo was proved; that is, the defendant uttered language charging the plaintiff with being a fraudulent gamester. I entertained some little doubt whether to constitute a cause of action it was not necessary that the charge should be specific; but on referring to Comyns's Digest, Action on the case for Defamation, (D. 4), I find that it is actionable if the defendant charge the plaintiff "with felony generally, as, he is a thief."

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WATSON, B.—I think that the rule ought to be absolute. This is an action for slander, not of a person in his trade, but simply imputing to the plaintiff that he was a "blackleg," and no special damage was proved. Under these circumstances it must be shewn that the slander imputes a charge upon which criminal proceedings might be taken. The word by itself cannot impute that the person to whom it is applied is liable to punishment. It imputes no crime. The word is a modern one, and does not convey any precise notion to my mind, and it is clear that it did not convey any definite idea to the mind of the pleader who drew the declaration. It may be actionable to say of a person that he is a "fraudulent gamester," but the innuendo was not proved here. The witness was asked "what do you understand by the word blackleg?" but that was not a proper question. In an action for slander in a foreign language a witness might be asked what he understood by the foreign word used. But suppose a person called another "a cheat," a witness could not be asked what

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was meant by the word "cheat" on a particular occasion. Certain slang terms, such as "lame duck," have obtained distinct and precise meanings as connected with a man's trade, and such meaning might be proved. In the case of *Daines v. Hartley (a)*, it was held, that unless a foundation is laid by shewing that something had previously passed which gave a peculiar character and meaning to some word, the question cannot be put to a witness "what did you understand by it?" It is necessary to shew that there was something to prevent the word from conveying the meaning which it ordinarily would convey. Here I think that no such foundation was laid for the question.

The Court being equally divided, the rule was discharged in order that the defendant might appeal.

(a) 3 Exch. 200.

#### DANIEL SUTTON v. BATH.

May 29.

Under the 17 & 18 Vict. c. 36, s. 1, where the occupation of a party to, or the witness of, a bill of sale, is not stated, the onus of proving that such party or witness has an occupation, lies on the party seeking to impeach the bill of sale on that ground.

**INTERPLEADER.**—At the trial before *Erle, J.*, at the Spring Assizes for the county of Surrey, it appeared that the plaintiff claimed the goods in dispute under a bill of sale from one John Sutton, as against the defendant who was the execution creditor in an action of *Bath v. John Sutton*. In the bill of sale, and affidavit filed under the 17 & 18 Vict. c. 36, s. 1, John Sutton was described as "gentleman." The attestation was by two witnesses, one of whom was properly described, but neither on the face of the bill of sale nor in the affidavit did anything appear as to the *occupation* of the other, though his residence was stated. On cross-examination of the plaintiff's witnesses, it appeared that John Sutton had acted as assistant

to a surgeon; but that he had had no employment in that capacity for many months before executing the bill of sale. He had written prefaces to some medical books, and had described himself in certain advertisements as "Dr. Sutton," and as a member of the College of Surgeons; but it was denied that he had practised as a surgeon or was a member of the College of Surgeons or Apothecaries' Company. He had hired a house and purchased some furniture with the view to let lodgings, but it did not appear that he had had any lodgers.

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Upon this evidence it was objected by the defendant's counsel that the bill of sale was void under the 17 & 18 Vict. c. 36, s. 1, the occupation of the assignor not being stated either in the bill of sale or the affidavit. The learned Judge overruled the objection, reserving leave to the defendant to move to enter the verdict for him, if the Court should be of opinion that the objection was well founded. The jury having found a verdict for the plaintiff,

*Hawkins*, in Easter Term, obtained a rule nisi accordingly or for a new trial, on the grounds; first, that the bill of sale was not duly registered pursuant to the 17 & 18 Vict. c. 36, s. 1, with such an affidavit as is required by that statute. Secondly, that the assignor was not properly described in the bill of sale or in the affidavit filed therewith, as required by that statute. He cited *Allen v. Thompson* (a).

*Edwin James* and *Raymond* now shewed cause.—The first point is, whether the defendant was properly described. There was evidence that he had been acting as assistant to a surgeon, and had been employed about editing medical books; but it did not appear that he had any occupation at the date of the bill of sale by which he could have been more properly described than as "gentleman." Then as to

(a) 1 H. &amp; N. 15.



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the witness: he may have had no occupation. [*Pollock*, C. B.—What is required is not the *addition* of the party, but his *occupation*.] If the defendant wished to avail himself of the objection, he should have asked the judge to leave the question to the jury, what was the occupation of the assignor.

*Watkin Williams*, in support of the rule.—The word “gentleman” is not any description of the occupation of the assignor. He was doing something to endeavour to gain a livelihood, and should have been described as “author” or “lodging-house keeper.” [*Bramwell*, B.—The evidence was that he was a doubtful “gentleman,” not that he had any occupation.]

Per CURIAM.—The rule must be discharged.

Rule discharged.

June 1.

NICHOLSON and Another, assignees of BOWMAN a bankrupt, v. COOPER.

A. conveyed goods by bill of sale to B. By a second bill of sale A. conveyed the same goods to C. A. having become bankrupt, and the first bill of sale not having been duly registered pursuant to 17 & 18 Vict. c. 36, s. 1, A.'s assignees brought an action of trover for the goods.—*Held*, that B. could not set up the bill of sale to C. against the assignees.

TROVER for household furniture.—Pleas: First, not guilty. Secondly, that the plaintiffs were not possessed.—Whereupon issues were joined.

At the trial before *Bramwell*, B., at the London sittings in Easter Term, it appeared that the action was brought to recover the value of certain furniture seized and sold by the defendant, and which the plaintiffs claimed as assignees of one Bowman a bankrupt. The bankrupt had conveyed the furniture in question to the defendant, by a bill of sale bearing date the 9th of March 1857. The bill of sale was

not duly registered in compliance with the 17 & 18 Vict. c. 36, s. 1, the affidavit containing a description of the residence and occupation of only one of two attesting witnesses. Bowman committed an act of bankruptcy on the 20th of May, and was adjudicated a bankrupt on the 7th of July 1857. Possession of the goods was taken by the defendant's agent on the 15th of June, and the goods were sold on the 7th of July. On the 21st of December 1857, the usual declaration that all the goods, &c. (specifically enumerating those in the bill of sale), were in the possession, order and disposition of the bankrupt at the time of the bankruptcy, and the order to sell and dispose of the same for the benefit of the creditors, was made by the Commissioner in bankruptcy. On the 7th of July, before the sale, the goods were demanded of the defendant but he refused to give them up.

The defendant's counsel called witnesses to prove that on the 19th of May 1857, the bankrupt gave a bill of sale to one Digby, and contended that, admitting the bill of sale to the plaintiff to be invalid, nevertheless Digby's bill of sale prevented the goods from being in the order and disposition of the bankrupt at the time of his bankruptcy, and therefore the plaintiffs were not entitled to maintain the action. The learned Judge overruled the objection, and directed a verdict for the plaintiffs, giving leave to the defendant to move to enter a verdict for him.

*Montague Smith* having obtained a rule calling on the plaintiffs to shew cause why the verdict should not be entered for the defendant, upon the ground that the plaintiffs had no title to maintain the action on account of the prior title of Digby,

*Bovill* and *Prentice* now shewed cause.—The defendant's bill of sale was valid until the bankruptcy. The 17 & 18 Vict. c. 36, s. 1, only avoids unregistered bills of sale

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as against assignees and execution creditors. The goods therefore at the time of the bankruptcy were in the order and disposition of the bankrupt, with the consent of the defendant, the true owner. The bill of sale conveyed the whole property in the goods to the defendant. Digby had no title, and could acquire none after the act of bankruptcy. [*Watson, B.*—The defendant did not claim under Digby.] In *Edwards v. English (a)*, which was an interpleader issue, it was held that the execution creditor could not set up a prior bill of sale made to a third party, but void under the statute, against a person claiming under a second bill of sale.

*Montague Smith*, in support of the rule.—The goods were not in the possession of the bankrupt with the consent of Digby, but of the defendant. [*Martin, B.*—The fact is that Digby never had any title at all. *Watson, B.*—The property never reverted to the grantor for an instant, so as to give Digby a title by estoppel. The defendant had a good title until the bankruptcy. Upon the bankruptcy the title at once passed to and became vested in the assignees. The defendant's title was then defeated absolutely and for all purposes.]

MARTIN, B.—This rule must be discharged. The real fact is, that Digby never had any title whatever to the goods.

WATSON, B.—I am entirely of the same opinion. There is another reason why the defendant must fail, and that is, that a defendant, in a case like the present, cannot set up the right of a third person except by the authority of such person.

Rule discharged.

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BARTON and Another, executors of COX, v. SARAH GAINER. June 3.

**DECLARATION.**—That the defendant detains from the plaintiffs two mortgages or deeds under the common seal of the Bristol and Exeter Railway, numbered respectively 1946 and 1948, each for securing repayment of the sum of 1000*l.*, &c.; and also divers, to wit, eight coupons or interest warrants to each of the said mortgages or deeds respectively annexed, being the mortgages, &c., of the plaintiffs as co-executors, &c.

Pleas: First, non detinet. Secondly, that the said mortgages or deeds, and coupons or interest warrants, were not, nor was any or either of them, the goods of the plaintiffs as alleged.—Whereupon issue was joined.

At the trial before *Crowder, J.*, at the Bristol Spring Assizes, the plaintiffs' case was that the defendant detained two debentures or mortgages of the Bristol and Exeter Railway Company, issued in pursuance of the 8 & 9 Vict. c. clv., each for the payment of 1000*l.* to the testator. The defendant proved that the testator, about a year and a half before his death, gave her two debentures with the coupons attached, saying "Take them and keep them for yourself, but you must give me the coupons that I may have the interest during my life." The defendant then took possession of the debentures and kept them locked up in her own drawer until after the testator's death. As the interest became due she cut off the coupons and handed them to the testator, who continued to receive the interest as long as he lived. It was agreed that the jury should find that there was such a gift of the debentures to the defendant as the evidence would warrant, and, by consent, a verdict was entered for the plaintiffs, leave being reserved to the

The 8 & 9 Vict. c. clv., s. 36, enacts, "that every transfer (of Bristol and Exeter Railway mortgages) shall be by deed duly stamped," &c. A., having in his lifetime given by word of mouth and delivery to B. two such mortgages or debentures.—*Held*, that, assuming the property in the mortgage debts did not pass by such gift, nevertheless that A.'s executor could not maintain detinue for the documents against B.

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defendant to move to enter a verdict for her if, upon the finding of the jury, the Court should be of opinion that the defendant was entitled to retain the debentures.

*Collier*, in Easter Term, obtained a rule nisi for that purpose, against which

*Montague Smith* and *Prideaux* now shewed cause.—The question is, whether the property in the mortgage debts passed to the defendant. [*Martin*, B.—Surely that is not the question. If the obligee of a bond gives it to a third person, the obligee's executors cannot claim back the paper on which the bond is written, though the gift may not operate as a valid assignment of the debt.] It is true that if a person gives to another a title deed as a piece of parchment, the parchment would pass, but it would be otherwise if the intention of the donor was to give an estate and the gift of the estate failed. A Court of equity will not give effect to an imperfect voluntary gift, such as that in the present case: *Dillon v. Coppin* (a). As there was not a good transfer of the debt, the gift fails; and as the intention of the plaintiffs' testator cannot be carried out, and the property in the debt remained in him, the defendant has no right to retain the documents which are merely accessory to the debt. [*Pollock*, C. B.—The owner may by grant sever the title deeds from an estate. *Martin*, B.—In *Sheppard's Touchstone*, p. 242, it is said:—"A man may give or grant his deeds, i. e., the parchment, paper and wax, to another at his pleasure, and the grantee may keep or cancel them. And, therefore, if a man have an obligation he may give or grant it away, and so sever the debt and it." *Watson*, B.—Suppose a person grants to another a bond and the bond debt, the debt passes in equity. A debt may be granted by parol without

(a) 4 M. & Cr. 647. See also *Jefferys v. Jefferys*, 1 Cr. & Ph. 138.

deed.] By the 8 & 9 Vict. c. clv., s. 36, it is enacted that "any party entitled to any mortgage granted under the power of the recited Acts, &c., may transfer his right and interest therein to any other person; and every such transfer shall be by deed duly stamped, wherein the consideration shall be truly stated." A transfer not in accordance with this Act is of no effect (a). [*Pollock*, C. B.—It does not follow that a stamped deed is necessary to transfer the document of title.] A chattel will not pass by a verbal gift without delivery: *Irons v. Smallpiece* (b): therefore the debt did not pass. The documents are merely accessory to the debt, and there was no intention to sever them by the gift. [*Collier* referred to *Gibson v. Overbury* (c), and *Burton's Compendium*, § 476.]

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*Collier* and *Karslake*, who appeared to support the rule, were not called upon.

POLLOCK, C. B.—This rule must be absolute. Conceding that the construction put upon the section by the plaintiff's counsel is correct, I should consider that if a person gives the parchment on which the mortgage is written, we ought to give effect to his act as far as we can.

MARTIN, B.—I think there is no doubt but that the defendant is entitled to retain the documents. What use she can make of them is a different question. The donor intended and hoped that the possession of the debentures would carry with it the property in them. But that does not alter the effect of the gift of the documents. If the defendant can avail herself of the documents in any way, either by compelling the executors to make a bargain with

(a) See *Doe d. Owen Jones v. David Jones*, 5 Exch. 16.

(b) 2 B. & Ald. 551.

(c) 7 M. & W. 555.

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her or otherwise, she is entitled to do so. Mr. *Smith* says, because the gift fails the defendant gets no title to the documents which are accessory to it. But we think that the gift ought to be treated as effectual as far as it can be.

WATSON, B.—I am of the same opinion. The finding of the jury shews that the debentures were given nearly two years before the testator's decease to the defendant, who always retained possession of them. I do not know what right the plaintiffs have to say that this was not a gift of them, though it may be that such gift and possession give no title to the debt. But the only question here is, whether the plaintiffs have a right to recover possession of the pieces of paper.

Rule absolute (a).

(a) See Co. Litt. 232, a. b.; 478, 496. But see *Searle v. Law*, *Kelsock v. Nicholson*, Cro. Eliz. 15 Sim. 95.



June 5.

GARLAND v. ALSTON.

The surrenderee of a remainder in a copyhold estate having died in the lifetime of the tenant for life :—*Held*, that on the decease of the tenant for life the heir of such surrenderee was entitled to be admitted on payment of a single fine.

THIS was a special case.—The action was brought by the plaintiff against the defendant, to recover the sum of 120*l*, being the amount of a double fine claimed by the plaintiff to be due to him from the defendant on the admission of the defendant to certain customary or copyhold hereditaments held of the manor of Wix Hall or Abbey, in the county of Essex.

The defendant contended that the plaintiff was entitled to 60*l*, being the amount of a single fine, and no more. The plaintiff is lord of the said manor, and the defendant is one of the customary or copyhold tenants thereof.

John Ham, a tenant of the manor, by his will dated the 26th day of April, 1824, gave and devised to his daughter Sarah, the wife of Joseph Cutting, all that his copyhold messuage or tenement and farm called Westlands, situate and being in Wix aforesaid, to hold the same unto his daughter, Sarah Cutting, for the term of her natural life, to and for her own sole and separate use and benefit (she committing no waste thereupon, and paying out of the rents thereof the annual interest upon the principal money due and owing on a certain mortgage). And after the decease of his daughter, Sarah Cutting, he gave and devised the same messuage or tenement and farm, called Westlands, unto his sons Robert Ham and William Ham, to be equally divided between them as tenants in common, and not as joint tenants, and to their several and respective heirs and assigns for ever, subject to the payment of the principal sum of money due on mortgage thereof at his decease.

The testator died in the year 1825, and his daughter was admitted according to the terms of the will, and paid a full fine.

At a general court baron holden for the said manor, on the 21st of June, 1830, the homage of that court presented an absolute surrender, bearing date the 24th of December 1829, from the said Robert Ham to D. C. Alston, since deceased, of all that the reversion or remainder of him the said R. Ham, expectant on the decease of Sarah Cutting, of and in one undivided moiety or equal half part (the whole into two equal parts to be divided or considered as divided), of and in all that the said messuage or tenement and farm called Westlands.

At the same court the homage presented an absolute surrender, bearing date the 15th of January, 1830, from the said William Ham to D. C. Alston, since deceased, of all that the reversion or remainder of him the said W. Ham,

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expectant on the decease of Sarah Cutting, of and in the other undivided moiety or equal half part of and in the same customary or copyhold lands and hereditaments. These surrenders were duly enrolled on the court rolls.

D. C. Alston died in September, 1846, without having been admitted to the said hereditaments. Sarah Cutting died in August, 1856.

On the 11th of April 1857, the defendant, as the customary heir of D. C. Alston deceased, was admitted to the said customary or copyhold hereditaments and premises. On the said admission taking place, the plaintiff demanded of the defendant the sum of 120*L.* for a double fine. The defendant was willing, and offered to pay 60*L.*, a single fine, but refused to pay the double fine, on the ground that 60*L.*, a single fine only, was under the foregoing circumstances payable.

The question for the opinion of the Court is, whether under the foregoing circumstances the plaintiff is entitled to a double or a single fine. If to a double fine, then the judgment of the Court is to be in favour of the plaintiff for 120*L.*, and the costs of the action: if to a single fine only, then the judgment is to be in favour of the plaintiff for 60*L.*, but the plaintiff is in that case to pay to the defendant the costs of the action.

*Lush*, for the plaintiff.—Before the 1 Vict. c. 26, an unadmitted surrenderee could not devise: *Matthew v. Osborne* (a). The 4th section of that statute provides, that “where the testator was entitled to have been admitted and might, if he had been admitted, have surrendered to the use of his will, and shall not have been admitted, no person shall be entitled to be admitted except on payment of all such sums of money as would have been due in respect

(a) 13 C. B. 919.

of surrendering such real estate to the use of his will, had the testator been duly admitted and afterwards surrendered to the use of his will." In *Scriven on Copyholds*, p. 342 (a), it is said:—"If the heir of a copyholder die before admission, the author apprehends that his heir or devisee could not compel admission except on payment of a double fine." The reason in both cases seems to be that the party entitled to be admitted gets the same benefit as if the ancestor had been admitted. The lord is bound to ascertain the title of the ancestor as well as of the heir. [*Bramwell*, B.—The lord is always entitled to have a tenant on the court roll. In the case put by *Scriven* there was a time when there was no tenant on the roll: here there was always a tenant on the roll. *Watson*, B.—In the case put the heir was seised though not admitted; again on his death his heir was seised. Here the ancestor was never in.] The lord has admitted the defendant as tenant; he is obliged to derive his title through the ancestor, and upon the principle that the ancestor must have paid a fine upon admittance, the defendant is bound to pay a fine for his ancestor as well as himself.

*R. E. Turner*, for the defendant, was not called upon to argue, but he referred to *Scriven on Copyholds*, p. 341, 4th ed., where it is said that, for reasons there given, "the author is induced to suppose that on the death of the surrenderee, before admission, the lord must admit his heir on payment of a single fine only. The contrary was stated, *arguendo*, in *The King v. Coggan* (b), on a motion for a mandamus to compel the lord to admit the heir of a surrenderee; but the Court appeared to entertain a different opinion, or at least must have doubted on the point, the rule for a mandamus being made absolute upon the heir's

(a) 4th edition. Citing *Morse v. Faulkner and Others*, 1 Anst. 11, 13.

(b) 6 East, 431.

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undertaking to pay such *fine or fines* as should be due to the lord."

POLLOCK, C. B.—Mr. *Lush* has not made out his proposition. The argument, based upon the Wills Act, ought not be carried further than the case provided for by the statute. Suppose there had been a series of assignments of the reversion, as if A., the father, being in possession, had devised the property to his daughter B. for life, remainder to C., and the remainder had then been conveyed by C. to D. and D. to E.; though until the death of B. no one had any right to be admitted or could gain any benefit by admittance, yet if the argument for the plaintiff is to prevail the lord ought to have a fine for every person who had a chance of being admitted. But the fine is due upon admittance, and if there was no necessity for admittance no fine became due. It is not reasonable that several persons in succession should pay a fine before one can get admitted, and it lies upon the plaintiff to make out clearly that such is the rule. This he has failed to do; therefore our judgment must be in favour of the plaintiff for the one fine, and he must pay the defendant's costs.

MARTIN, B.—I am of the same opinion, upon the ground that no authority has been shewn to exist in favour of the plaintiff's claim. If the 1 Vict. c. 26, s. 4, had never passed, and the power of disposition had been left as it was before, the tenant could not have devised his copyhold unless he surrendered to the use of his will, which would have entitled the lord to a fine; and the legislature, in altering the law as regards the tenant's power of making a will, took care not to affect the lord's right to a fine.

BRAMWELL, B.—I am of the same opinion.

WATSON, B.—I am of the same opinion. Where a copyhold estate is limited in remainder, the admittance of the tenant for life operates for the benefit of those in remainder, unless there is a custom in the manor for the payment of a double fine. In all cases the fine becomes due on admittance. The old copyhold law is clear, that the heir of an unadmitted ancestor is entitled to admittance. If the heir is entitled only on the ground that the ancestor was entitled to be admitted, and the lord could have compelled the ancestor to come in and pay his fine on admittance, the heir must pay a double fine; but that is not so here, because the ancestor never was a tenant of the manor.

Judgment accordingly.

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WALKER v. GOE and Another, Clerks, &c.

May 26.

THE declaration, which was by the plaintiff against the defendants, clerks to the Commissioners for putting in execution "An Act (9 Geo. 4, c. xxx.) for improving and maintaining the navigation from the river Humber to Alvingham, in the county of Lincoln, and from thence to Louth, in the same county," stated that the Commissioners, by virtue of

An Act enabling navigation Commissioners to grant a lease of a canal contained a clause as follows:—  
In case the lessees during the

term should permit the navigation to be out of repair, the Commissioners "are hereby authorized and required to give notice thereof to such lessees, &c., and in such notice to specify the particular repairs which ought to be done; and the Commissioners may by such notice require that such repairs should be commenced, proceeded with and finished within reasonable periods to be named by the Commissioners, and in case the lessees shall neglect to commence, &c., such repairs, &c., then it shall be lawful for the Commissioners and they are hereby authorized to take possession of the tolls, &c., and to cause such repairs to be done under their own direction, and to pay the necessary expenses of making such repairs out of the said tolls," &c. The lease having been granted in pursuance of the Act, during its continuance one of the locks of the canal became out of repair, but the Commissioners, though they knew of the want of repair, gave no notice of it to the lessee though a sufficient time had elapsed for the giving of such notice. A barge entered the canal while the lock was so out of repair, but was prevented from getting out again by the falling in of the lock.—*Held*, that no action lay by the owner of the barge against the navigation Commissioners for neglecting to give notice to the lessees to repair, on the ground that the detention of the barge was not a damage naturally flowing from the neglect of the Commissioners to give notice, it not being shewn that if such notice had been given the lessees would have repaired, or that the Commissioners would have taken possession and repaired.

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the powers conferred on them by that statute, did grant the lease, by that Act authorized, of the navigation and the tolls, &c., for the term of forty-eight years from, &c., which said term, at the time of the committing of the grievance, &c., had not yet expired: that during the continuance of the term and after the granting of the lease, the lessees in possession of the said demised premises permitted a certain part of the said navigation, and of the works thereof, to be out of, and the same was for a long time out of, proper repair, and a sufficient time for the Commissioners to obtain notice and full knowledge thereof had elapsed before the negligence and breach of duty hereinafter complained of; and the Commissioners in fact had notice and knowledge of the said want of repair, before such negligence and breach of duty: Yet the Commissioners, not regarding the statute or their duty, did not give to the said lessees notice of the said part being out of proper repair as aforesaid, in such notice specifying the particular repairs which ought to be done; but wholly neglected and omitted so to do contrary to the said statute, although a reasonable time for the said Commissioners to give such notice elapsed before the happening of the grievance, &c.—Averment: that by reason of the negligence of the Commissioners and the disregard of their duty as aforesaid, the said part of the said works gave way and fell into the said navigation, and thereby a certain part of the said navigation was for a long time, to wit, five weeks, rendered useless and impassable, and the passage of boats, &c., thereon prevented, &c.; and that by reason of the premises the plaintiff during all the time aforesaid was prevented from passing along the said navigation with a certain barge, &c., whereof he was master, &c., and was detained with the said barge thirty-two days, and thereby lost the use of the said barge, &c. (a).

(a) There was a second count and pleas to it, upon which nothing turned.

Pleas:—First, not guilty. Secondly, that the lessees did not permit the said part of the navigation to be, nor was the same out of repair. Thirdly, that a sufficient time for the Commissioners to obtain notice and full knowledge of the alleged want of repair had not elapsed before the alleged negligence and breach of duty. Fourthly, that a reasonable time for the Commissioners to give the notice mentioned had not elapsed before the commission of the grievance.—Whereupon issues were joined.

The cause came on to be tried before *Jervis*, C. J., at the Lincoln Summer Assizes in 1856, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:—

By the 9 Geo. 4, c. xxx., after reciting the 3 Geo. 3, c. 39, intituled “An Act for making a navigation from the river Humber, by a canal or cut at or near Tetney Haven, to the river Ludd, in the parish of Alvingham in the county of Lincoln, and for continuing the said navigation in or near the said river, from thence to or near the town of Louth in the same county;” whereby certain Commissioners were authorized to raise money, for the purpose of making the said navigation, upon the security of tolls payable under the said Act by persons using the said navigation; and that the said Commissioners had borrowed 28,000*l.*: that the navigation was found to be defectively constructed: that meetings had been held for the purpose of devising the means of procuring the necessary funds for putting the said navigation in repair: that C. Chaplin had proposed to advance all the money necessary for the repairs of the river and to keep the same in good and sufficient repair, subject to the orders and directions of the Commissioners, provided the Commissioners would invest him with certain powers, which proposal had been approved of, &c.; and that it had been ordered and agreed that the navigation and tolls should be vested in C. Chaplin for a term

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of ninety-nine years, and C. Chaplin had agreed to accept the trust and to do all the works which should be ordered to be done by the Commissioners for the support of the navigation: and that doubts had been entertained whether the Commissioners had authority to enter into such agreement: It was enacted that the recited Act should be repealed, and that the first mentioned Act should commence and be put in execution for the purposes therein mentioned: and Commissioners were appointed for carrying the same into execution. By section 9 it is enacted, that it shall be lawful for the Commissioners to grant to the person entitled to the beneficial interest under the agreement, "a lease of the said navigation, and the tolls, dues and other proceeds thereof, for the term of forty-eight years, from the 24th of June 1828," &c.: "provided always, that the lessee or lessees for the time being, claiming under and by virtue of such lease, shall be subject to all the payments, rules, regulations, restrictions, pains, penalties, and forfeitures mentioned in this Act." Section 28 enacts, that "in case the lessees or lessee, in possession for the time being, shall at any time during the continuance of the said term permit the said navigation or the works thereof, or any of them, to be out of proper repair, the said Commissioners are hereby authorized and required to give notice thereof to such lessees or lessee, and in such notice to specify the particular repairs which ought to be done; and the said Commissioners may by such notice require that such repairs should be commenced, proceeded with, and finished within reasonable periods, to be named by the said Commissioners in such notice; and in case the said lessees or lessee shall neglect to commence or to proceed with or to finish such repairs in the manner so specified, then it shall be lawful for the said Commissioners and they are hereby authorized to take possession of the tolls and other proceeds of the said navigation, and to cause

such repairs to be done under their own direction, and to pay the necessary expenses of making such repairs out of the said tolls and other proceeds; and when the said repairs shall have been completed and the said expenses paid, the said Commissioners shall restore the possession of the said tolls and other proceeds to the said lessees or lessee" (a).

After the passing of the 9 Geo. 4, c. xxx., a lease, dated the 28th of August, 1828, was duly executed to F. Chaplin and G. Chaplin for the term of forty-eight years. By two several statutes, 10 & 11 Vict. c. cxiii. and 10 & 11 Vict. c. cxlviii., and by assignments duly made under the authority thereof, the estate and interest of F. Chaplin and G. Chaplin in the navigation, tolls and other premises became vested in the Great Northern Railway Company for the residue of the term, the Company being made subject to the liabilities of the original lessees. The Great Northern Railway Company were, at the time of the committing the several grievances complained of, the lessees in possession of the said navigation and other demised premises.

The plaintiff is the master of a barge trading upon and using the said navigation between Louth and the Humber. On the 14th of October, 1855, he took in a cargo of wheat at Louth for the purpose of conveying it along the canal in his barge, and was prepared to leave Louth with it on the following day. On the 15th a part of the works belonging to the navigation, called Alvingham Lock, fell in for want of proper repairs, by reason of which that part of the navigation was wholly stopped, and the plaintiff and his barge and cargo were necessarily detained on the canal at Louth for thirty-two days. The plaintiff claimed to recover the sum of 22*l.* 17*s.*, being made up of an uniform sum per day for

(a) Section 82 enacts that all persons shall be at liberty to navigate the canal on payment of the tolls.

Section 113 enables the Commis-

sioners to create a fund for defraying any extraordinary expenses for repairs or improvements of the canal.

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the time during which the plaintiff was detained in the canal by reason of the stoppage, calculated according to the average weekly earnings of the plaintiff's vessel when the detention occurred. The verdict was taken for that amount.

It was proved that for some time previous to the 15th of October, 1855, Alvingham Lock had been in a state of dilapidation and want of repair, and that this was known to the agent of the Commissioners appointed by them to superintend the canal, and also to the Commissioners, but that the Commissioners had not given any notice to the lessees, under the 28th section of the 9 Geo. 4, c. xxx., requiring proper repairs to be done, though sufficient time had elapsed for the giving of such notice, and for the performance of proper repairs before the lock fell in.

Upon this evidence the jury found a verdict for the plaintiff upon the first count of the declaration, and the issues arising upon that count.

The questions for the opinion of the Court are:—First, whether the action is maintainable. Secondly, if the action be maintainable, upon what principle the damages ought to be assessed. If the Court should be of opinion that the action is maintainable, then the verdict found for the plaintiff is to stand; but if the Court should be of opinion that the plaintiff is not entitled to the amount of damages claimed, then the amount of damages is to be reduced to such sum as the Court shall direct. If the Court shall be of opinion that the action is not maintainable, then a nonsuit is to be entered.

*Hayes*, Serjt. (with whom was *Boden*) argued for the plaintiff (*a*).—No clause in this act of parliament imposes on the lessees any duty to repair the navigation and works.

(*a*) In Easter Term, April 23. Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Channell*, B.

By the 28th section, in case the lessees permit the navigation or the works to be out of repair "the Commissioners *are authorized and required to give notice thereof*" to the lessees, and if the lessees do not repair after notice, "it shall be *lawful* for the Commissioners and they are *authorized*" to take possession of the tolls and cause repairs to be done under their own directions. Now, taking the whole section together, it appears that a duty is imposed on the Commissioners to repair the navigation and works or cause them to be repaired; and for the breach of this duty the Commissioners are liable to an action though they act gratuitously and derive no profit from their office, because there are funds applicable to the purpose of repairs: *Gibbs v. The Trustees of the Liverpool Docks* (a). [Martin, B.—Would not a mandamus to take the steps pointed out be the proper mode of compelling them to repair? It would seem that the 9th section imposes the duty of repairing upon the lessees.] The damages are calculated on the ordinary principle in cases of demurrage.

*Mellor* (with whom was *Phipson*), for the defendants.—The action is not maintainable. Both by the lease and the Act the duty of repairing is cast on the lessees. The lessees have the tolls; the Commissioners have the reversion and a certain power of superintendence, but the primary duty to repair is on the lessees. [Pollock, C. B.—To the argument that the lessees are liable to repair, the lessees might answer that they had no notice from the Commissioners, and that without an order from the Commissioners they would have to do the repairs at their own expense.] According to the true construction of the 28th section the Commissioners are only required to give

(a) *Antè*, p. 164. He referred also to *The Lancaster Canal Company v. Parnaby*, 11 A. & E. 223.

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notice to the lessee before they exercise the power of taking possession of the tolls and doing the repairs themselves. If the Commissioners give notice to the lessees to repair and the lessees neglect to do so, the Commissioners are not liable though they do not exercise the extraordinary power of taking the tolls and doing the repairs themselves. [*Pollock*, C. B.—I doubt whether that power is discretionary: where parties are authorized to do a thing which is for the benefit of the public they are bound to do it except where the words “at their discretion,” or some equivalent expression is used.] The cases of *Hall v. Smith* (a) and *Harris v. Baker* (b) shew that Commissioners for public purposes who act gratuitously are not liable to actions for mere nonfeazance. In *Gibbs v. The Trustees of the Liverpool Docks* (c), the Commissioners were in the receipt of tolls, and had received enough for the repairs. The Commissioners here had no funds. [*Pollock*, C. B.—Suppose the Commissioners after having taken the tolls into their own hands, under the 28th section, neglected to do necessary repairs, surely they would be liable. Then, is not the right to receive the tolls equivalent to receiving them.] Here the lessees are in possession and liable to an action for not repairing. It can hardly be contended that the Commissioners are also liable. [*Channell*, B.—Suppose the lessees had done all the repairs that they were required to do by the Commissioners, and such repairs were insufficient, who would be liable?] The lessees. [*Channell*, B.—The 28th section contains three provisions: the word “required” occurs only in the first.]—Then, as to the damages. The plaintiff ought not to have remained at Louth. He should have unloaded his barge and gone elsewhere, and he is not entitled to an amount

(a) 2 Bing. 156.

(b) 4 M. & Sel. 27.

(c) *Antè*, p. 164.

equivalent to what would have been the profits of his trade. [*Bramwell*, B.—The question of damages is settled by the finding of the jury.]

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*Hayes*, Serjt., in reply.—The lessees may be liable, but nevertheless this action is maintainable against the Commissioners. [*Bramwell*, B.—If there is a duty to repair, and the lessees are in possession, the lessees are liable.] The lessees have no power to close the canal, except at the request and by the direction of the Commissioners, for repairs. As to the damages, the case finds that the boat was necessarily detained in the canal.

*Cur. adv. vult.*

The judgment of the majority of the Court (*Martin*, B., doubting) was now delivered by

*POLLOCK*, C. B.—The plaintiff's claim in this case is not, as in *Gibbs v. The Liverpool Dock Company* (a) and *Parnaby v. The Lancaster Canal Company* (b), founded on any undertaking or duty arising from the reception of the plaintiff's barge on the canal, nor could it have been, since, as the Great Northern Railway Company are in possession of the canal, any such undertaking or duty would be on their part. But the action is founded, as the declaration states, on an assumed duty in the Commissioners to give notice of want of repair, and on an alleged loss following therefrom.

The facts are that the plaintiff entered the canal with his barge; after he entered a lock fell in, which prevented his leaving with his barge: the lock fell in for want of proper repair; the want of repair was known to the Commissioners who gave no notice to the lessees, although a sufficient time had elapsed for the giving of such notice, and the doing of the repairs.

(a) *Ante*, p. 164.

(b) 11 A. & E. 223.

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Now we say nothing as to whether there is any obligation, as between the Commissioners and the public, or the lessees and the public, to keep the canal *open*, nor whether, if not, there can be any duty to do an act only tending to keep it open. Nor do we stop to consider how the defendants are to be reimbursed (see section 21); nor whether during the lease the duty is on the lessees only. On the question, whether section 28 does not impose a duty on the Commissioners, as between them and the public, to give the notice therein mentioned, we entertain some doubt. It is, we think, difficult to say, that it was intended that, instead of their having a discretion to determine whether the canal was out of repair, and whether, if it was, they would give notice, it should be open to any one to say "you have done a wrong, because you wrongly judged the canal was in repair," or "because you did not sufficiently specify the repairs." Our doubts on this point are strengthened by the provisions in the Act, that the Commissioners may in such notice require that the repairs should be done in reasonable periods, and that, in default, it shall be *lawful* for them to cause the repairs to be done. Now, if the 28th section creates any duty, it is difficult to say it is any other than a duty to exercise a discretion, and that the non-exercise, or improper exercise of it can give rise to a cause of action. If the wrong by the Commissioners is wilful or malicious, it is a cause of action against the individuals, if at all, and consequently not against their clerks.

But secondly, assuming a duty in the Commissioners, such as supposed, and that the non-exercise thereof would afford ground of action, we think the alleged damage neither did nor could arise therefrom. It is on this ground we decide the case. It is not shewn that the lessees would have repaired, nor that the Commissioners would have taken possession and repaired. It is not shewn that the plaintiff did not know of the want of repair and so risk the mischief.

And further the wrongful matter of which he complains took place before he entered the canal, consequently before he was interested in the matter; as to him, therefore, it only becomes wrongful *ex post facto*, and by his own act. But to say that the damage could be the consequence of the wrongful act or omission, is, in our judgment, to assert a false proposition of law. The surmise is,—if the notice had been given the repairs would have been done and the lock would not have fallen in, and so not giving notice caused the lock to fall in. As we have said, this is not proved; but it is not the proximate, necessary, or natural result of not giving notice. The not giving of notice is not sufficient to bring about the result; the giving of it would not be sufficient to hinder it. This shews that the declaration is bad; but as a bad declaration must be proved in omnibus, and there is no proof of the damage flowing from the act complained of, we think a nonsuit should be entered. We see no objection to the damages if any are due.

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Judgment for the defendant.

JACKSON v. ISAACS.

June 10.

THE declaration stated that the plaintiff and the defendant agreed by charter-party that the agent of the defendant should load the plaintiff's ship, called "The Sir Charles Napier," then at Liverpool, with a full and complete cargo of salt, &c., which said ship should carry to the charterer's

The defendant chartered a ship to load a full cargo "on being paid freight, payable by charterer's acceptance, on ship clear-

ing the custom house at L., subject to insurance." The ship, having sailed, was lost, being at that time uninsured. In an action by the shipowner for the non-payment of the agreed freight. — *Held*, that it was no defence that the shipowner had not insured the freight.

*Semle*, that the shipowner was not bound to insure, but was to receive the freight in advance less the amount of premium on a policy of insurance to be effected by the charterer.

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factory at Fernando Po in the Millicaurie River and Yaury Bay, calling at Malacong for orders, and there deliver the same on being paid freight at the rate of 20s. per ton of twenty hundredweight on the quantity shipped, payable by charterer's acceptance at four months, payable in London on ship clearing at the Custom House, Liverpool, subject to insurance, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation of what nature and kind soever during the voyage, always excepted. Averments.—That the agent of the defendant did load the ship with a cargo pursuant to the charter-party, and that before the commencement of the suit she cleared at the Custom House, Liverpool, and sailed from Liverpool on the said voyage, &c.; and the plaintiff did all things necessary to entitle him to the payment of the agreed freight, and all things had happened and all times had elapsed, &c.—Breach that the defendant did not, nor would pay the said freight by his acceptance at four months.

Plea.—That the freight was to be paid by the defendant to the plaintiff in advance, subject to insurance, and that the plaintiff never did insure the said freight for the benefit of the defendant, or otherwise howsoever, but wholly omitted so to do; and that after the said vessel sailed from Liverpool on the said voyage with the cargo on board, and during the said voyage, the said ship with the said cargo on board was by the perils of the sea wholly lost, and thereby the said freight never was earned, but became and was wholly lost.

Demurrer and joinder.

*Honyman*, in support of the demurrer. — According to the true construction of this contract the defendant was to pay freight in advance, subject to a deduction of the premium for insurance. The obligation to pay is not

conditional on the plaintiff insuring the freight. The plaintiff would have had no insurable interest after receiving his freight in advance, the risk would have been on the defendant; he, therefore, is the only person who could have insured, and the reasonable construction of the contract is, that he should deduct the cost of doing so. That was the construction put by the Court of Queen's Bench on a similar stipulation in *Hicks v. Shield* (a). It is quite consistent with the plea that the defendant may have insured the freight himself. The plea should at least have averred that the freight was never insured.

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*Edward James* (with whom was *Mellish*), for the defendant.—The true construction of the contract is, that the defendant agrees to advance freight, subject to the plaintiff's insuring to the defendant the return of the freight, either by repaying it to, or insuring it for, the defendant in the event of the freight not being earned. There is a fallacy in the argument that the plaintiff could not insure. He had an insurable interest because he was not entitled to freight until after the termination of the voyage. The defendant then bargained that, the plaintiff having insured so as to place him in a safe position if the cargo should not arrive, he would advance the freight. The effect of the contract is, that the defendant agreed to accommodate the plaintiff if the plaintiff would put him into a condition not to lose by it. There is nothing to indicate that the advance was to be of a sum less than the whole freight. The natural meaning of "subject to" is "on condition," or "provided that" the act stipulated for is done. Thus, "subject to insurance" means insurance by the person to whom the promise to pay is made. [*Martin*, B.—Suppose that construction is right, might not

(a) 7 E. & B. 633.



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the plaintiff have insured at any time before the loss of the vessel? The charterer was bound to give his acceptance on the ship's clearing at the custom house. It was therefore not a condition precedent to the plaintiff's right to receive this acceptance that he should have insured.] It is not disputed that the payment of freight was to be in advance, but to avoid circuity of action the defendant may set up as an answer that the plaintiff has not insured. In fact the non-insurance goes to the whole consideration. [*Martin*, B.—To make out a defence on that ground, the damages in the two actions should be necessarily identical, but in an action for not insuring the damages would not necessarily be the whole amount of freight.]

*POLLOCK*, C. B.—I am of opinion that the plea is bad for many reasons which have been mentioned during the argument.

*MARTIN*, B.—I am of the same opinion.

*BRAMWELL*, B.—I am also of opinion that the plaintiff is entitled to judgment. As a matter of construction I have no doubt as to the meaning of this contract, viz., that the advance of freight was to be subject to an allowance for the premium on the policy of insurance. But the plea is bad in any view. If the defendant insured the freight for 500*l.* he would be entitled to recover the whole amount from the insurer. If *Mr. James's* argument is right, the plaintiff is not entitled to be paid the entire amount of the freight, but a sum minus the premium on the policy. Therefore, in the cross-actions, the plaintiff and defendant would not be entitled to the same damages.

*WATSON*, B.—There is no doubt what is meant by this

stipulation. It provides for a payment of freight in advance : *De Silvale v. Kendall* (a). The defendant then is the only person who would have insured the freight. It, therefore, seems clear that the payment by the defendant was to be subject to a deduction for the expense of the insurance which he was to effect.

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Judgment for the plaintiff.

(a) 4 M. & Sel. 37.

FIELD v. THE NEWPORT, ABERGAVENNY AND HEREFORD  
RAILWAY COMPANY.

June 10.

**T**ROVER for waggons and coals.

Pleas.—First, not guilty. Secondly, that the goods were not the goods of the plaintiff. Thirdly, that the defendants had carried the goods, and also certain other goods which had been removed from the defendants' premises, along the defendants' railway for the plaintiff: that tolls had become due from the plaintiff to the defendants in

By the 8 & 9  
Vict. c. 20,  
s. 97, it is pro-  
vided that if,  
on demand  
any person  
fail to pay the  
tolls due in  
respect of any  
carriage, &c.,  
it shall be  
lawful for the  
Company to  
detain and sell

the carriage, &c., of the party liable to such tolls, and out of the monies arising from such sale to retain the tolls.—*Held*, that a demand of the sum actually due for tolls is a condition precedent to the right to sell under this section.

By the 9 & 10 Vict. c. ccciii., s. 29, a railway Company were empowered to take tolls for the use of their railway in respect of the tonnage of articles conveyed upon the railway certain sums per ton, and a further sum if conveyed in the carriages of the Company; and by s. 30, tolls for the use of engines. Section 35 fixed a maximum rate of charge, including the charges for the use of carriages, waggons or trucks, and for locomotive power, and all other charges incident to such conveyance. By section 37, the Company were empowered to take increased charges for the conveyance of goods, by agreement with the owners of goods, by reason of any special service. The Company having for a considerable time carried on their line coals in carriages belonging to the plaintiff, from P. to H., made a demand of a gross sum equal to the amount of the tonnage rates for coals and use of engines; and also of a sum claimed by them for sending back the plaintiff's empty carriages from H. to P. They gave no explanation of the items making up the gross sum claimed. The plaintiff having omitted to pay the amount claimed, the Company sold the plaintiff's carriages, &c., to satisfy the amount due.—*Held*, that the sum claimed for sending back the return waggons was not toll, and that the Company having demanded a larger sum than that due for tolls, the sale was unlawful.

*Semble*, that the Company might be entitled to charge for sending back the waggons by agreement as for special services under section 37.

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respect of the said carriage and goods, which had been duly demanded by the defendants of the plaintiff, but which the plaintiff failed to pay. Wherefore the defendants sold the goods to pay for the tolls due.

The plaintiff took issue on all the pleas, and to the third also replied:—Secondly, that he was ready and willing to pay all tolls legally due to the defendants in respect of the said carriage &c., and that before the sale he tendered and offered to pay to the defendants the sum of 365*l.* 3*s.* 6*d.*, being the whole amount legally due and payable as and for such tolls, which sum the defendants refused to accept. Thirdly, that the defendants did not before the sale demand of the plaintiff the tolls due to the defendants in respect of the carriage and goods, but a much larger sum than was due.—Whereupon issues were joined.

The cause came on to be tried before *Alderson*, B., at the Gloucester Summer Assizes, 1856, when a verdict was taken by consent, subject to a case, which was in substance as follows:—

Between October 1854 and April 1855, the defendants had conveyed upon their railway 2,378 tons of coal and 58 tons of guano for the plaintiff (a).

(a) By the Newport, Abergavenny and Hereford Railway Act, 1846, (9 & 10 Vict. c. ccciii.), s. 29, it is enacted “that it shall be lawful for the Company to demand any tolls *for the use of the railway*, not exceeding the following, that is to say, in respect of the tonnage of all articles conveyed upon the railway, or any part thereof, whether propelled by engines belonging to the Company or otherwise, as follows:—For all sorts of manure, &c., coals, &c., per ton per mile not exceed-

ing one halfpenny; and if conveyed in carriages belonging to the Company an additional sum per mile per ton not exceeding one-eighth of a penny \* \* \* For all goods, wares, or merchandize, matters or other things (for which no other payment is herein imposed), per ton per mile not exceeding twopence; and if conveyed in carriages belonging to the Company an additional sum per ton per mile not exceeding one halfpenny; and for every carriage of whatever description, not

The coals were carried from the Pontypool Junction to Hereford a distance of 33 or 34 miles: the guano a somewhat longer distance. One hundred and sixty tons of the coal and all the guano were conveyed in waggons belonging to the defendants, and the rest of the coal in the plaintiff's waggons. The loading and unloading were done by the plaintiff.

When the coals had been delivered the defendants conveyed back the plaintiff's empty waggons from Hereford to the Pontypool Junction, and 314 of such waggons of the average weight of four tons were conveyed during the above mentioned periods, some for a distance of 33, some for a distance of 34 miles. The defendants delivered to the plaintiff monthly accounts of the weight of coals and guano

being a carriage adapted and used for travelling on a railway, and not weighing more than one ton, carried or conveyed on a truck or platform, per mile not exceeding sixpence, and a sum not exceeding twopence per mile for every additional quarter or fractional part of a quarter of a ton which any such carriage may weigh; and if such carriage be conveyed on a truck or platform belonging to the Company an additional sum per mile not exceeding twopence."

By section 30, "The toll which the Company may demand *for the use of engines* for propelling carriages on the railway, shall not exceed for \* \* \* coals, &c., three-eighths of a penny per ton per mile, and for other goods one halfpenny per ton per mile."

By section 35, "The *maximum rate* of charge to be made by the Company, including the charges for the use of carriages, wag-

gons or trucks, and for locomotive power, and *all other charges incident to such conveyance* (except a reasonable charge for the expense of loading and unloading, where such service is performed by the Company), shall not exceed, &c. For the matters mentioned under Class 1, not exceeding per ton per mile one penny. For the matters mentioned under Class 4, not exceeding per ton per mile three pence."

By section 37, nothing therein is "to prevent the Company from taking any increased charges, over and above the charges therein limited, for the conveyance of goods of any description, by agreement with the owners of or other persons in charge of such goods, either in respect of the conveyance thereof by passenger trains, or by reason of any other special service performed by the Company in relation thereto."

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carried, and the amount claimed for tonnage. In the account for October 1854, the defendants charged at the rate of  $2s. 11\frac{1}{4}d.$ , per ton for such of the coals as were conveyed to Hereford in the plaintiff's waggons, and  $3s. 4d.$  a ton for such as were conveyed in the waggons of the defendants. The charge in fact included a charge for the conveyance back of the empty waggons, but this did not appear upon the accounts. After October they charged  $3s. 6d.$  per ton for coals conveyed to Hereford in the plaintiff's waggons, and  $3s. 10d.$  per ton for such as were conveyed in the waggons of the defendants, their charges in like manner including charges for the empty waggons. The total amount claimed on this account was  $437l. 14s. 1d.$

The amount of the tonnages on goods conveyed in the plaintiff's waggons at 7-8ths of a  $1d.$  per mile, and on such as were carried in the defendants' carriages at  $1d.$  per mile, being the rates allowed by the special Act, is  $315l. 11s. 3d.$ , which being deducted from the said sum of  $437l. 14s. 1d.$  leaves  $122l. 2s. 10d.$  as the amount charged for the conveyance of the empty waggons, and this is at the rate of nearly three farthings per ton per mile for the empty waggons.

In April 1855, the plaintiff applied for an explanation of the charges. The defendants answered that the plaintiff well knew what the charges were, and that such charges were made according to their act of parliament. The defendants then gave notice that unless the charges were paid the plaintiff's coals and waggons detained by them would be sold. The plaintiff again applied to the defendants, and requested to know how much was charged per ton per mile for tolls, locomotive power and waggons, and in respect of what other duty the remainder of the charge was made up, but the defendants refused to enter into the details of the rates charged.

On the 4th of May the defendants advertised the coal

and waggons for sale. The plaintiff then tendered 365*l.* to the defendants as due in respect of tolls. The defendants offered to take this sum on account, but the plaintiff refused to pay it otherwise than in full. On the 11th of May the sale took place, and the plaintiff's waggons and coals were sold and realized 448*l.* 6*s.*, the expenses of the sale being 4*l.* 12*s.*

On the 21st of June this action was brought. At the trial the defendants claimed a right to charge a sum, by way of tonnage, for the conveyance of the plaintiff's empty waggons from Hereford to the Pontypool Junction, after the delivery of the goods from such waggons at Hereford; and if they have such right such sum being added to the 315*l.* 11*s.* 3*d.* will give a sum which exceeds 365*l.*

The questions for the opinion of the Court are, whether under their act of parliament the defendants are entitled to make any and what charge for the conveyance of empty waggons? If they are, whether it is competent to them, in answer to this action, to claim to charge the plaintiff with any sum for the carriage of the plaintiff's empty waggons? Whether, if no more than 365*l.* was due, there was a sufficient tender of that amount to render unlawful the subsequent sale of the plaintiff's waggons and goods?

If the decision of the Court should be in favour of the plaintiff, then the amount of damages is to be settled by an arbitrator, and the verdict entered accordingly. If the Court should be of a contrary opinion, the verdict is to be entered for the defendants.

*Phipson* (with whom was *Scotland*) argued for the plaintiff.—The 8 & 9 Vict. c. 20, s. 97, enacts that, "If, on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the Company to detain and sell such carriage, or all or any part of such

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goods, or, if the same shall have been removed from the premises of the Company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale to retain the tolls," &c. The power to detain and sell the carriages, &c., to satisfy the tolls, is made conditional upon a demand of the tolls. In the present case there was no demand of the tolls. The defendants never informed the plaintiff of their intention to charge for sending back his waggons. They cannot justify selling for the amount of tolls due for the carriage of coals and guano, because they never demanded it. Assuming that the charge for the return waggons may be due by special agreement, it is not toll. By the 8 & 9 Vict. c. 20, s. 3, the word "toll" is to "include any rate or charge or other payment *payable under the special Act*, for any passenger, animal, carriage, goods, merchandize, articles, matters, or things conveyed on the railway." By section 93, a list of all the "tolls" which shall be exacted by the Company is to be painted on a toll board. Now the charge for sending back the empty waggons is not a charge which the Company are empowered to make by the special Act, nor is it published on the board. In fact the Company had no right to make such a charge. By section 92, "It shall not be lawful for the Company at any time to demand or take a greater amount of toll, or make any greater charge for the carriage of passengers or goods, than they are by this and the special Act authorized to demand; and upon payment of the tolls" all persons "shall be entitled to use the railway, with engines and carriages properly constructed." [*Bramwell*, B.—The argument is, that the owner of a carriage has a right to use the railway and need only pay tolls for the goods in it. Is it contended that if he brings back the carriage himself he is liable for tolls?—They also argued

that the tender was sufficient. [*Pollock*, C. B., referred to *Sutton v. Hawkins* (a) and *Cheminant v. Thornton* (b).]

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*Pigott*, Serjt. (with whom was *Gray*), for the defendants.—The 97th section of the 8 & 9 Vict. c. 20, does not make it necessary that a railway Company should furnish a detailed account of the tolls demanded. They are bound to make a demand before they distrain, and the defendants did so here. From time to time they sent in accounts claiming the tolls in a form which had not been objected to, though the amount claimed included a charge for the conveyance back of the empty waggons. The first question is, whether the defendants were entitled to make any charge for bringing back these waggons. [*Watson*, B.—Suppose we concede that the Company are entitled to charge something, how does it appear that the sum so charged is toll?] By 9 & 10 Vict. c. ccciii., s. 29, the Company are empowered to charge “for all goods, wares or merchandize, matters or things (for which no other payment is imposed), per ton per mile not exceeding two pence.” [*Pollock*, C. B.—It is clear that that section applies only to things that can be carried in the carriages.] If the Company are entitled to charge a fare for carriages running on the railway, that is “toll” in the common and popular acceptance of the term, and within the terms of the interpretation clause, section 3 of the 8 & 9 Vict. c. 20, which makes the word “tolls” include “rate, charge or other payment.” [*Bramwell*, B.—May not the expense of sending back the waggons be included in the term “other charges incident to such conveyance,” in the 35th section of 9 & 10 Vict. c. ccciii.? *Watson*, B.—Probably that does not apply where the Company do not find the carriages.]



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BRAMWELL, B.—I am of opinion that the plaintiff is entitled to judgment. The defendants professed to act under the powers given to them by 8 & 9 Vict. c. 20, s. 97. They cannot proceed under that section except after a demand of the tolls due. Has there been a demand of the tolls in the present case? The demand here was of a sum made up of the tolls and of a charge for returning empty waggons, not of two sums separately stated but of a lump sum. Now, unless both the sums of which this amount was made up consisted of tolls, there was no demand of the tolls due, but of a sum exceeding the tolls. My brother *Pigott* first contended that the defendants were entitled to demand something for returning the waggons. I think they were. I do not think that they were bound to bring back the plaintiff's empty waggons. But assuming that, as the result of an agreement between the plaintiff and the defendants, the defendants were entitled to charge for doing so, either on a *quantum meruit* or an agreed sum, that is not "toll" within the 97th section of the 8 & 9 Vict. c. 20. It is said that the interpretation clause (section 3) speaks of toll as including "rate or charge or payment," payable under the special Act, for any matter or thing conveyed on the railway. But the charge for return waggons is in no sense a toll. My brother *Pigott* then contended that, if a larger sum is demanded, that is a good demand of the sum actually due. But the 97th section makes a demand a condition precedent to the right to distrain, and no person not complying with the Act in that respect can avail himself of the power in question. The defendants therefore had no right to sell the plaintiff's goods. If I am called upon to say whether or not the defendants were entitled to make a charge for sending back the waggons, I should say that they were, supposing that there was an agreement express or implied to that effect. But, as to the second question, I say that it was not

competent to the defendants to set up the right to such charge in answer to this action, because it is not toll in respect of which they could, by making a demand, entitle themselves to distrain.

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WATSON, B.—I am of the same opinion. Before the Company can distrain they must demand the toll itself, not a larger sum. In this case the reasonableness or propriety of the charge for the return waggons is not in question. If due at all, it is due by agreement and not as a toll. A larger sum than that which was due for tolls was demanded. The seizure and sale were therefore unlawful.

Judgment for the plaintiff (a).

(a) *Pollock*, C. B., had left the Court.

### HOGG v. WARD.

May 26.

**TRESPASS** for false imprisonment.—Plea: Not guilty (by statutes 7 Jac. 1, c. 5, s. 1, 21 Jac. 1, c. 12, s. 5, 19 & 20 Vict. c. 69, s. 1, 2 & 3 Vict. c. 93, s. 8, 1 & 2 Wm. 4, c. 42, s. 19).

At the trial before *Martin*, B., at the Spring Assizes for the county of York, it appeared that on the 9th of June, 1857, the plaintiff, a butcher residing at South Cave, was arrested by the defendant, the superintendent of police for the district, for having in his possession some traces alleged to have been stolen from one Johnson, who was a person in

A constable is not justified in arresting a supposed offender for felony, without warrant, at the instigation of a third party, unless there exists a reasonable charge and suspicion.

driven by his servant, when J., a person in the habit of attending fairs, stopped the cart and said to the defendant, a constable, "these are my traces which were stolen at the peace rejoicing in 1856." The defendant sent for the plaintiff, who immediately attended, and asked him how he accounted for the possession of the traces. The plaintiff said that he had seen a stranger pick them up in the road and he had bought them of him for a shilling. The defendant then took the plaintiff into custody and brought him before a magistrate, by whom he was discharged.—*Held*, that under these circumstances there was no reasonable charge, and that the defendant was liable in an action for arresting the plaintiff.

*Quære*, whether the question of reasonable charge is one for the Court or the jury.

In June 1857, the cart of the plaintiff, who was a butcher, was being

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the habit of attending fairs as an itinerant showman. The traces were on the horse in the plaintiff's cart, which was being driven by his servant at Cave fair. Johnson stopped the cart, and said to the defendant "these are my traces which were stolen at the peace rejoicing in 1856." The defendant sent for the plaintiff who at once attended. The defendant asked the plaintiff how he accounted for the possession of the traces. The plaintiff stated that he had seen a stranger pick them up in the road, and that he had bought them of him for a shilling. The defendant then handcuffed the plaintiff and detained him in custody till the next morning, when he was taken before a magistrate who immediately discharged him. According to the evidence of the plaintiff and another witness, Johnson was not present when the defendant took the plaintiff into custody, but the defendant, who was called as a witness on his own behalf, stated that Johnson said to him, when the plaintiff arrived, "these are my traces, and I insist upon your taking him into custody." The defendant resided about three miles from South Cave, and had known the plaintiff for many years.

At the conclusion of the evidence the counsel for the defendant submitted to the learned Judge that, upon the facts admitted by the plaintiff to be true, the defendant was entitled to have the verdict entered for him. The learned Judge intimated that he rather thought there was a question for the jury; and the result was that it was agreed that the opinion of the jury should be taken upon the amount of damages, and the question reserved for the Court both upon the law and the fact.

*Hugh Hill*, in last Easter Term, obtained a rule to shew cause why the verdict should not be entered for the defendant pursuant to the leave reserved.

*Temple* and *W. S. Cross* now shewed cause. -There was

no reasonable ground for arresting or detaining the plaintiff. He had not been directly charged with felony by Johnson. A constable is not justified in arresting a person upon a charge which is not reasonable. The instructions issued to police constables are, that "The constable must arrest any one whom he sees in the act of committing a felony, or one whom another positively charges with having committed a felony, or whom another suspects of having committed a felony, *if the suspicion appear to the constable to be well founded*, and providing the person so suspecting go with the constable." In *M'Cloughan v. Clayton (a)*, *Bayley, J.*, held that the constable was not bound in all events to take the alleged offender before a magistrate. He said: "if a felony be committed in the presence of the constable, he is bound to act; so, if a charge of felony be made with reasonable circumstances, it is his duty to act." *Isaacs v. Brand (b)* is a strong authority that the charge must be a reasonable one. In *Samuel v. Payne (c)* it was taken for granted that the charge was reasonable. In *Hedges v. Chapman (d)*, *Best, C. J.*, did not advert to the reasonableness of the charge, but the mode in which the question arose rendered it unnecessary for him to do so. When an innocent person has been arrested by a constable, the question is whether the circumstances made it reasonable that the constable should arrest him at the time when the arrest was made. In the present case, the facts that the plaintiff was a householder, and that his residence was known to the constable, afford strong evidence that the arrest was not reasonable.

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*Hugh Hill and Perronet Thompson*, in support of the rule.—A constable is justified in arresting if a charge be made *bonâ fide* and not collusively, that is, if the constable does not make himself a party to the wrong. The charge must

(a) Holt, N. P. C. 478.

(b) 2 Stark. Rep. 167.

(c) 1 Doug. 359.

(d) 2 Bing. 523.

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be taken to be reasonable if the constable had no means of knowing that it was not true. In *Samuel v. Payne* (a), Lord Mansfield said: "If a man charges another with felony, it would be most mischievous that the officer should be bound first to try, and at his peril exercise his judgment on the truth of the charge." [Pollock, C. B.—In a note by Mr. Chitty, in Blackstone's Commentaries, vol. 1, p. 292, it is said, "a constable may justify an imprisonment without warrant on a reasonable charge of felony made to him, though he afterwards discharge the prisoner without taking him before a magistrate."] In *White v. Taylor* (b), Le Blanc, J., held that the constable may, "if he please, exercise his own judgment on a charge made before him; but if the plaintiff cannot make out such a case as amounts to collusion, or that makes the constable a party to the wrong, if a regular charge be made before him he is warranted in committing the party charged." In *Hobbs v. Branscombe* (c), the fact of a charge having been made was held a sufficient justification to the constable. The charge in the present case was made under circumstances not inconsistent with its truth. [Bramwell, B., referred to Hale's Pleas of the Crown, p. 93.] In the case of a constable, the charge constitutes reasonable and probable cause; and moreover in this case there was evidence of reasonable and probable cause. The fact of non-recent possession is no ground of discharge. A constable may act on a reasonable charge; or he may act on circumstances within his own knowledge, or on the information of others, but in the two latter cases there must be reasonable and probable cause. When a charge is made the constable acts ministerially, and it is no part of his duty to inquire into the merits of the case. [Pollock, C. B.—If upon a reasonable charge of felony, or other crime for which a constable may arrest without warrant, the constable

(a) 1 Doug. 359.

(b) 4 Esp. 80.

(c) 3 Camp. 420.

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refuse to arrest or make hue and cry, he may be indicted and fined: Burn's Justice, vol. 1, p. 275, 29th ed.] If the circumstances afford reasonable ground of suspicion that the party charged has committed a felony, the constable is justified in arresting him: *Davis v. Russell* (a); and if in resisting the constable is killed, he would be guilty of murder: *Rex v. Ford* (b), *Rex v. Woolmar* (c).

POLLOCK, C. B.—We are all of opinion that the rule must be discharged. I abstain from expressing any opinion, except what is necessary for disposing of this particular case. The general law and authorities have established that, in order to justify an arrest, there must be a reasonable charge. Whether that is to be decided by the Judge as a matter of law, or by the jury as a matter of fact, is not important on the present occasion, because it was expressly reserved for the Court to decide. It appears to me that in this case there was not a reasonable charge, and that the verdict for the plaintiff ought to stand.

MARTIN, B.—I am of the same opinion. The law is correctly laid down in Burn's Justice, vol. 1, p. 273, 29th ed., where it is said that a constable may "apprehend a supposed offender for a felony without warrant upon a reasonable charge made by a third party, and this although upon investigating the charge it turn out that no felony has been committed. But there must in all cases exist a reasonable charge and suspicion." Therefore the constable is bound to ascertain whether the charge is reasonable. I am of opinion that the charge in this case was not reasonable. The traces, which were on the plaintiff's horse, were alleged to have been stolen. The plaintiff was not present at the

(a) 5 Bing. 354.

(b) Russ. &amp; Ry. 329.

(c) Moo. C. C. 334.

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time the charge was first made, but on being sent for he came and gave an account of how he came possessed of the traces; but in defiance of that the defendant arrested and imprisoned him. Looking at all the circumstances, I cannot think that the charge was reasonable, or that there was any real suspicion that the plaintiff had stolen the traces.

BRAMWELL, B.—I am of the same opinion. The law is correctly laid down in *Burn's Justice*. It is not every idle and unreasonable charge which will justify an arrest, but there must be a charge not unreasonable. The Metropolitan Police Act, 2 & 3 Vict. c. 47, s. 64, authorizes "any constable belonging to the metropolitan police to take into custody without a warrant all persons whom he shall have good cause to suspect of having committed or being about to commit any felony, misdemeanor, or breach of the peace." This does not say that any charge is enough, but by implication says only such a charge as gives the constable *good cause* to suspect the person charged. If a person comes to a constable and says of another simpliciter "I charge this man with felony," that is a reasonable ground, and the constable ought to take the person charged into custody. But if from the circumstances it appears to be an unfounded charge, the constable is not only not bound to act upon it, but he is responsible for so doing. Here the question is whether the charge was not unreasonable. In my opinion it was a charge most unreasonable. I agree with Mr. *Thompson* that the case must be treated as if it were a case of recent possession, but then the other circumstances must be looked at. The plaintiff used the traces in the most open manner; and, when asked, he told how he got possession of them, and moreover the person who claimed them was a person not unlikely to have lost them.

WATSON, B.—I am of the same opinion. There is no doubt about the law on the subject. So far as my experience goes, it has always been laid down by the Judges and in the text books, that a constable may arrest without warrant where there is a reasonable charge of felony. The question here is whether there was a reasonable charge. I think there was not. The argument as to reasonable and probable cause has no application: the question is whether a reasonable charge was made. Now, every case must be governed by its own circumstances, and the charge must be reasonable as regards the subject-matter and the person making it. If an idiot made a charge the constable ought not to take the person so charged into custody. In *Isaacs v. Brand* (a) Lord *Ellenborough* said that the declaration of the thief did not justify a constable in taking a person into custody upon a charge of receiving the stolen goods. I have attentively considered whether the charge in this case was reasonable, because it is of the utmost importance that the police throughout the country should be supported in the execution of their duty,—indeed it is absolutely essential for the prevention of crime; on the other hand, it is equally important that persons should not be arrested and brought before magistrates upon frivolous or untenable charges. Whether the question of reasonable charge is matter of law for the Judge, or matter of fact for the jury, I do not express an opinion, as that was left to us and I come to the conclusion that this was not a reasonable charge. It is not necessary to repeat the facts, but taking them strongly in the defendant's favour, I think that this was not a reasonable charge, and that the defendant acted contrary to his duty and contrary to law in arresting the plaintiff.

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Rule discharged.

(a) 2 Stark. N. P. 167.



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June 9.

THE ATTORNEY GENERAL v. MAJOR SIBTHORP.

A testator devised his estates in L. to his brother C. for life, with remainder in tail to his first and other sons. On the 22nd March, 1848, C. and the defendant, his eldest son, executed a disentailing deed whereby they limited the estate to such uses as they should jointly appoint, and in default of such appointment to the uses declared by the will of the testator. On the same day C. and the defendant executed another disentailing deed of estates devised to them by another testator and also limited them to such uses as they should jointly appoint.

On the 23rd March, 1848, C. and the defendant executed a joint appointment, whereby, after reciting the two disentailing deeds, and certain arrangements made in respect of incumbrances with other stipulations, they appointed the estates in L. to the use that the defendant might receive thereout the yearly sum of 1000*l.* during the joint lives of himself and C., and subject thereto to the use of C. for life in restoration, corroboration, and confirmation of his previous life estate, and after his decease to the use of the defendant for life, and after his decease to the use of his eldest son for life, with remainder in tail male. In the year 1855 C. died.

*Held:* First, that the defendant took a succession under a disposition made by himself, within the meaning of the 12th section of "The Succession Duty Act, 1853," and was therefore chargeable with duty at the rate of 3 per cent.

Secondly, that the defendant was not entitled under the 38th section to any allowance in respect of the 1000*l.* a year, which ceased on the death of C.

**I**NFORMATION by the Attorney General as follows:—


1. The object of this information is to obtain payment of the duty which has become payable to her Majesty in respect of the succession of the above named defendant, Major Sibthorp, to certain real property formerly belonging to his uncle, Coningsby Waldo Sibthorp, Esquire, deceased (hereinafter referred to as "the testator").

2. The testator was at the time of making his will and of his death hereinafter respectively mentioned, absolutely beneficially seized and entitled for an estate of inheritance in fee simple of and to certain real property such as in the Succession Duty Act, 1853, is mentioned, that is to say, certain manors, messuages, lands, and hereditaments in the counties of Lincoln and Oxford, and the city of Lincoln, or otherwise had full power and authority to appoint and dispose of the same by will, and on the 6th day of November, 1821, he made his last will and testament in writing of that date, which was duly executed and attested as was then by law required for the devise of freehold estates; and he hereby gave and devised the said real property to the use of his brother Charles De Laet Waldo Sibthorp (herein

after referred to as "Colonel Sibthorp"), and his assigns for his natural life, and after his death to the use of the first son of the body of his said brother Colonel Sibthorp lawfully begotten, and the heirs male of the body of such first son lawfully issuing, with divers remainders over.

3. The testator afterwards died without having revoked or altered the disposition of his real property made by his will, and he left his brother Colonel Sibthorp him surviving, who thereupon became tenant for life in possession of the said real property, and as such was at the time of the date and execution of the disentailing deed hereinafter stated protector of the settlement made by the said will, and the above named defendant Major Sibthorp was at the time of the date and execution of the said disentailing deed the eldest son of the body of the said Colonel Sibthorp, and as such was entitled to the real property devised by the said will as before stated as tenant in tail male in remainder expectantly on the death of his said father the tenant for life.

4. On the 22nd day of March, 1848, Colonel Sibthorp and Major Sibthorp together made and duly executed a certain disentailing deed of that date, which was expressed to be between Colonel Sibthorp of the first part, Major Sibthorp of the second part, and Joseph Tatham, therein described, of the third part; and thereby after reciting the devise made by the said will as before stated, and also reciting, as the fact is, that Major Sibthorp had then attained the age of twenty-one years and that Colonel Sibthorp and Major Sibthorp were desirous of barring and defeating the estate in tail male and all other estates tail of Major Sibthorp in the real property in the said will mentioned, and all estates to take effect after the determination thereof, but without disturbing the uses or estates limited by the said will, which were prior to the use or estate thereby

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limited to the first son of the body of Colonel Sibthorp to be begotten in tail male, and also of conveying and limiting the same respectively to the uses and in manner therein after mentioned: it is witnessed, that Colonel Sibthorp, so far as related to the use or estate for his own life of or to which he was seized or entitled in the said real property, did grant, alien and convey; and Major Sibthorp, with the consent of Colonel Sibthorp as the protector of the existing settlement of the said real property in the said will mentioned, by virtue of the statute in that case made and provided, did grant, dispose of and confirm unto the said Joseph Tatham, his heirs and assigns, all the said real property devised by the will of the said testator, to have and to hold the same unto the said Joseph Tatham and his heirs, freed and discharged from the said estate in tail male and all other estates tail of Major Sibthorp in such real property, and all remainders, reversions, estates, rights, titles, interests, and powers, to take effect after the determination; or in defeazance of such estate in tail male or estates in tail, to such uses upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes, agreements, and declarations as Colonel Sibthorp and Major Sibthorp should at any time or times, by any deed or deeds with or without power of revocation and new appointment, to be by them sealed and delivered in the presence of, and attested by two or more credible witnesses, from time to time jointly direct, limit or appoint; and for default of and until such joint direction, limitation or appointment, and so far as no such joint direction, limitation or appointment should extend, to the uses upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, agreements, and declarations which, under and by virtue of the said will of the said testator and any assurance or assurances, if any, referring

thereto, were subsisting and capable of taking effect immediately before the sealing and delivery of the said disentailing deed.

5. The said disentailing deed was afterwards within six months after the execution thereof duly inrolled in the Court of Chancery in pursuance of the provisions of the said statute in that behalf.

6. Afterwards on the 23rd day of March, 1848, Colonel Sibthorp and Major Sibthorp together made and duly sealed and delivered in the presence of two credible witnesses, who duly attested the same, a certain indenture or deed of appointment of that date, which was expressed to be between Colonel Sibthorp of the first part, Major Sibthorp of the second part, and the Reverend Humphrey Waldo Sibthorp, clerk, and Richard Ellison, Esquire, of the third part; and thereby after reciting amongst other things the said before stated disentailing deed of the 22nd day of March, 1848, and a certain other disentailing deed or indenture of the same date similar thereto, whereby certain other real property was settled and conveyed to the same uses; and that an arrangement had been entered into between Colonel Sibthorp and Major Sibthorp for making a provision for Major Sibthorp during the Colonel's lifetime out of all the real property mentioned in both the said disentailing deeds or indentures respectively: it is witnessed that Colonel Sibthorp and Major Sibthorp did thereby for the considerations therein mentioned, and in exercise and execution of the several powers or authorities in or by the said two several disentailing deeds or indentures respectively reserved or limited to them for that purpose, and of every other power or authority enabling them in that behalf, jointly direct, limit and appoint that all the said real property should thenceforth remain and be, and that the said two several disentailing deeds or indentures of the 22nd

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day of March, 1848, should at all times thereafter operate and enure to the uses upon the trusts, and with, under and subject to the powers, provisoes, agreements, and declarations thereafter expressed and contained concerning the same; and Colonel Sibthorp and Major Sibthorp did also, by the now stated indenture or deed of appointment, in further pursuance of the said arrangement and agreement, and for the nominal consideration therein mentioned, grant, alien and confirm unto the said Humphrey Waldo Sibthorp and Richard Ellison, and their heirs, all the said real property, to have and to hold the same unto the said Humphrey Waldo Sibthorp and Richard Ellison, their heirs and assigns, to the uses, intents and purposes therein declared concerning the same, that is to say, to the use, intent and purpose that Major Sibthorp and his assigns should, during the joint lives of himself and Colonel Sibthorp, out of the said real property have, receive and take one clear yearly rent or annual sum of 1000*l*. of lawful money of Great Britain, free from taxes except income tax, and without any other deduction whatsoever, to be paid and payable to Major Sibthorp and his assigns, during the joint lives of himself and Colonel Sibthorp, by quarterly payments on the days therein after mentioned, that is to say, the 1st day of April, the 1st day of July, the 1st day of October, and the 1st day of January, in equal portions, and subject to and chargeable with the said annuity to the use of Colonel Sibthorp and his assigns for his natural life without impeachment of waste; and after his decease to the use of Major Sibthorp and his assigns for his natural life without impeachment of waste; and after the decease of Major Sibthorp to the use of Coningsby Charles Waldo Sibthorp, the first son of the body of Major Sibthorp, and his assigns, for his natural life without impeachment of waste; and after his death to the use of the first, second, third, fourth, and all and every other

son and sons of the body of the said Coningsby Charles Waldo Sibthorp lawfully begotten, successively and in remainder one after another as they should be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such sons and son lawfully issuing with divers remainders over, and with an ultimate remainder to the use of Major Sibthorp, his heirs and assigns for ever, as by the said indenture or deed of appointment now in the defendant's possession or a copy thereof when produced will appear.

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7. Afterwards and during the continuance of the disposition made of the said real property as before stated, and during the lifetime of the above named defendant Major Sibthorp, and after the 19th day of May, 1853, being the time appointed for the commencement of the Succession Duty Act, 1853, that is to say on the 14th day of December, 1855, Colonel Sibthorp died, and thereupon Major Sibthorp succeeded to the said real property as tenant for life thereof under the before stated disposition thereof, and became entitled to the beneficial enjoyment thereof and entered into possession of the same accordingly.

8. Under and by virtue of the Succession Duty Act, 1853, there was and is payable to her Majesty in respect of the succession of the above named defendant, Major Sibthorp, to the real property devised by the will of the said testator as before stated, under the before stated disposition thereof, according to the value thereof, to be ascertained in the manner directed by the said Act, a duty at the rate of 3*l*. per cent. upon such value, payable by eight equal half-yearly instalments, the first whereof ought to have been paid at the expiration of twelve months next after the said defendant became entitled to the enjoyment of the said real property.

9. Application has been made to the defendant Major

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Sibthorp to pay the said duty, but he declines so to do; and sometimes he says that he is not liable to pay any duty whatever in respect of his said succession, inasmuch as he takes the whole thereof under a disposition made by himself; and at other times he says that at all events he takes one moiety of his said succession under a disposition made by himself and is not liable to pay any duty thereon, and as to the other moiety he takes the same under a disposition made by his father the said Colonel Sibthorp, and any duty which he may be liable to pay thereon must be calculated at no higher rate than 1*l*. per cent.; and in any case he claims in computing the assessable value of his said succession to have an allowance made to him in respect of his annuity of 1000*l*., which he says he has relinquished or been deprived of, upon taking his said succession, within the meaning of the 38th section of the Succession Duty Act, 1853.

Prayer.—That it may be declared that the defendant Major Sibthorp is chargeable with duty at the rate of 3*l*. per cent., or at some other rate, in respect of his succession to the real property devised by the will of the said testator as hereinbefore stated; and that the particulars of such succession, and the amount of duty payable by him in respect thereof, may be ascertained (if necessary) under the direction of the Court, and that the defendant may be decreed to pay such duty to the Receiver General of Inland Revenue on behalf of her Majesty, and that for the purposes aforesaid all proper accounts and inquiries may be taken and made.

The defendant filed an answer to the information, the following paragraphs of which were referred to by his counsel in the course of the argument:—

4. Colonel Sibthorp and the defendant did make and execute a disentailing deed of the date, and between the parties in the fourth

paragraph of the said information mentioned, and which is hereinafter referred to as the first disentailing deed; and thereby, after reciting the said will of the said Coningsby Waldo Sibthorp and otherwise to the effect in the said information mentioned, and after also reciting (as the fact was) that the personal estate of the said testator by his said will not specifically bequeathed, thereby directed to be applied in or towards payment of his debts, was in part applied for that purpose, and that other part was received by the said Colonel Sibthorp and applied for his own purposes, but that no account of such personal estate and of the application thereof had ever been rendered or made out. And after also reciting that the devised estates were by virtue of the mortgages referred to in the said will and of the said will, and of a charge by the said Colonel Sibthorp in part exercise of the said power in the said will contained for charging the said estates with the sum of 10,000*l.*, then liable to divers mortgages, charges or incumbrances, and that the said defendant notwithstanding the direction in the said will contained for applying the personal estate not specifically bequeathed in or towards the payment of the debts or charges therein mentioned, and the non-application of any part or parts of the said personal estate according to the said direction, was willing that the said devised estates should, as between him and the said Colonel Sibthorp, and also as between the person or persons for the time being entitled to the said estates, and the personal representatives of the said Coningsby W. Sibthorp, after such representatives should have been released or exonerated by the said Colonel Sibthorp and the said defendant, thereupon be considered as charged with and liable to the mortgages, charges and incumbrances then existing and thereafter to be created thereon, free from any claim or demand of or by the said defendant on account of any misapplication of the personal estate or the non-application thereof or of any part thereof for the purpose aforesaid, the said defendant having consented to forego all claims and demands under or in respect of the direction aforesaid, and every such misapplication or non-application as last aforesaid. It was witnessed that the said Colonel Sibthorp, so far as related to the uses or estate for his own life, or of or to which he was seised or entitled in the said real property, did grant, alien and convey, and the said defendant, with the consent of the said Colonel Sibthorp as such protector, did grant, dispose of, and confirm unto the said Joseph Tatham and his heirs, all the said real estates devised by the said will. To hold the same unto the said Joseph Tatham and his heirs, subject to such charges and incumbrances as were subsisting on the said premises, or any of them, before and at the time of

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the death of the said C. W. Sibthorp and were then still continuing, and also subject to all charges and incumbrances which were made or executed upon the said premises or any of them by the said will and which were then subsisting as aforesaid, and to all charges and incumbrances which had been made or executed by virtue of any power by the said will limited to the said Colonel Sibthorp and were then continuing. But as to all the said premises freed and discharged from the said estate in tail male, &c.

5. The said Colonel Sibthorp and the defendant also duly made and executed another disentailing deed of the same date and between the same parties as the last hereinbefore stated indenture, but which related to other real estates situate in the counties of Hertford and Middlesex, and is hereinafter referred to as the second disentailing deed. By such deed, after reciting the will of Charles De Laet, under which, upon the failure of certain preceding limitations, certain real estates situate in the counties of Hertford and Middlesex and elsewhere were devised to Colonel Sibthorp and his assigns for his life, with remainder to the first son of the body of the said Colonel Sibthorp lawfully begotten and the heirs male of the body of such first son, and after also reciting a decree of the High Court of Chancery, made in a suit instituted for the administration of the estate of the said Charles De Laet, which decree was dated the 14th day of March, 1794, and by which it was directed (amongst other things) that the clear residue of the personal estate of the said Charles De Laet should be laid out in the purchase of lands, and that such lands, when purchased, should be settled to the same uses as the said real estates in Hertford and Middlesex by the said will of the said Charles De Laet stood limited. And that in the meantime the said residue should be paid into the bank to the credit of the said cause and invested; and after divers recitals, whereby it appeared (as the fact was) that certain sums of stock and other moneys then standing to the credit of the said cause formed part of the residue of the said personal estate, and after reciting that the said Colonel Sibthorp and the defendants were desirous of barring and defeating the estate in tail male and all other estates tail of the said defendant in the said estates and premises in Hertfordshire and Middlesex, and also in the real estates, in the purchase of which the said several sums of stock and monies directed to be laid out, and of conveying and limiting the said real estates discharged from the said estates in tail male and other estates tail, and the remainders, reversions, estates, rights, titles, interest and powers, to take effect after the determination of the same estate in tail male and other estates tail; to the uses and in

manner thereafter mentioned, and of discharging the several sums of stock, and all other monies then liable to the same trusts or any of them, from the trusts or liability to which the same several sums respectively were liable, to be laid out in the purchase of lands or hereditaments to be settled; but subject to the payment of the costs, charges and expences thereafter mentioned, in the proportions and manner thereafter expressed. It is witnessed that the said Colonel Sibthorp, so far as relates to the use or estate to which he was entitled for his life in the said freehold premises, did grant and convey, and the said defendant, with the consent of the said Colonel Sibthorp as the protector of the settlement, did grant, dispose of, and confirm unto the said Joseph Tatham and his heirs, all the said freehold premises in the said counties of Herts and Middlesex, devised by the said will of the said Charles De Laet, and by any assurance or assurances limited, or by any other means then subject to the aforesaid uses of the same will; to hold the same unto the said Joseph Tatham and his heirs freed and discharged from the said estate in tail male and all other estates tail of the said defendant, and all remainders, reversions, estates, rights, titles, interests and powers to take effect after the determination or in defeazance of such estate in tail male and estates in tail, to such uses, upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations, as the said Colonel Sibthorp and the defendant should at any time or times, by any deed or deeds as therein mentioned, jointly direct, limit or appoint, and for default of, and until and subject to such joint direction, limitation or appointment, to the use of the said Colonel Sibthorp and his assigns for his life, and after his death to the use of the said defendant his heirs and assigns. And the now stating indenture also contained a covenant on the part of the said Colonel Sibthorp and the said defendant, to surrender certain copyhold hereditaments, then subject to the uses and trusts of the said will of the said Charles De Laet, freed and discharged from the estates tail of the said defendant, to the like uses as are hereinbefore mentioned with respect to the said freehold estates. And it was also witnessed that the said Colonel Sibthorp assigned, and the said defendant, with the consent of the said Colonel Sibthorp as such protector as aforesaid, assigned and disposed of, unto the said Joseph Tatham, his executors, administrators and assigns, all those the said sums of stock and other monies, to hold the same unto the said Joseph Tatham, his executors, administrators and assigns, freed and discharged from all trusts for the laying out of the said several sums of stock and monies respectively in the purchase of land, and

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for the said estate in tail male, and other estates tail of the said defendant, and all remainders, reversions, estates, rights, titles, interest and powers to take effect after the determination or in defeazance of such estates in tail male and in tail, but nevertheless upon the trust thereafter mentioned (that is to say) :—As to three of the said sums of stock, consisting of 714*l.* 11*s.* 11*d.* Bank 3*l.* per cent. reduced Annuities; 2,233*l.* 5*s.* 3*d.*, 3*l.* per cent. Consolidated Annuities, and 5,062*l.* 4*s.* 10*d.*, 3*l.* per cent. Consolidated Annuities, in trust thereout to discharge a moiety of the costs, charges and expences of and incidental to the entering into and carrying into effect an arrangement between the said Colonel Sibthorp and the defendant, as to as well the said estates in the counties of Herts and Middlesex as the said hereditaments in the said counties of Lincoln and Oxford respectively devised by and liable to the uses of the said will of the said Coningsby Waldo Sibthorp for barring the estate in tail male of the said defendant in the said estates and hereditaments respectively, and to transfer and pay the residue of the same funds and money respectively unto the said defendant, his executors or administrators. And as to another of the same sums, namely the sum of 24,013*l.* 1*s.* 1*d.*, 3*l.* per cent. Consolidated Annuities, and the sum of 98*l.* 5*s.*, in trust thereout to discharge the other moiety of the costs, charges and expences aforesaid, and to stand possessed of the residue thereof in trust for the said Colonel Sibthorp, his executors or administrators. And as to another of the said sums, namely, the sum of 2,445*l.* 8*s.* 4*d.* Bank 3*l.* per cent. Annuities, in trust for the said Colonel Sibthorp and the defendant respectively, and their respective executors, administrators and assigns, as tenants in common, in the proportions following, that was to say, as to two third parts thereof for the said Colonel Sibthorp, his executors, administrators and assigns. And as to the remaining one third part thereof for the said defendant, his executors, administrators and assigns, subject to the payment of so much of the costs, charges and expences aforesaid, as the funds and moneys thereinbefore directed to be applied in payment thereof should be insufficient to pay (if any).

7. The said Colonel Sibthorp and the defendant did execute a deed of appointment dated the 23rd of March, 1848, and made and duly executed between and by the said Colonel Sibthorp of the first part, the defendant of the second part, and the Reverend Humphrey Waldo Sibthorp and Richard Ellison of the third part, whereby after reciting the said first disentailing deed, and that the several charges or incumbrances referred to in such deed comprised the several incumbrances specified in the third schedule to the now stating indenture, which

incumbrances included a charge for the sum of 5,000*l.* made by the said Colonel Sibthorp in part exercise of the aforesaid power by the said will of the said C. W. Sibthorp given to him to charge the said hereditaments with the sum of 10,000*l.* for his own benefit; but they did not comprise so much of the said sum of 10,000*l.* as had not been actually charged by the said Colonel Sibthorp under the said power, nor annual sum for jointure, nor any sum of money for portions for younger children. And after also reciting the said second disentailing deed, and, as the fact was, that the said Colonel Sibthorp had from time to time made various permanent improvements in or upon the hereditaments or estates in the said county of Lincoln and in the said county of the city of Lincoln, comprised in the said first disentailing deed, or in or upon some of them, by the effectual drainage of lands, the rebuilding of houses and other buildings and otherwise, and that he had also made certain additions to the same estates by some small purchases made with his own monies, which additions were incorporated with and then formed part of the said settled estates; and, after also reciting that an arrangement had been entered into between the said Colonel Sibthorp and the said defendant for making a provision during the life of the said Colonel Sibthorp for the said defendant, and, in case of his death in the lifetime of the said Colonel Sibthorp, leaving Lousia W. Sibthorp, his then present wife, surviving, for his said wife during her life; and, in case of the death of both of them the said defendant and Lousia Waldo his wife in the lifetime of the said Colonel Sibthorp, then for the children or child of the said defendant, from and out of all the said several estates and premises comprised in the said disentailing deed (except certain parts of certain estates in the said county of Herts which were purchased by the Great Northern Railway Company), and for settling the said estates and premises (except as aforesaid), but including as well the pieces or parcels of land which had been by the said Colonel Sibthorp added to the said hereditaments in the county of Lincoln and in the county of the city of Lincoln (except certain lands and hereditaments at Branston purchased by the said Colonel Sibthorp) as all the said manors and hereditaments in the said counties of Lincoln and Oxford and in the said county of the city of Lincoln comprised in the said first disentailing deed, and the said freehold and copyhold hereditaments comprised in the said second disentailing deed (but subject, as was thereafter mentioned, to the charges and incumbrances thereafter specified or referred to, and subject also as to the hereditaments in the said county of Lincoln, so as aforesaid contracted to be sold to the said Great Northern Railway Company, to such contract, to the

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uses, upon and for such trusts, intents and purposes, and with, under and subject to the powers, provisoes, declarations and agreements thereafter contained or expressed of or concerning the same. And after also reciting that, under the said arrangement for the settlement of all the said estates, it had been agreed that the several estates or hereditaments to be comprised in the now stating indenture should be deemed to be discharged in equity and at law from any and every claim or demand of or by each of them the said Colonel Sibthorp and the said defendants respectively for or in respect of the direction in the said will of the said C. W. Sibthorp contained for the discharge from or out of his personal estate of the charges or incumbrances therein referred to, and the application or misapplication (if any) of such personal estate, and also for or in respect of the payment or discharge by the said Colonel Sibthorp of any of such charges or incumbrances out of his own monies. And after also reciting that it had been agreed by the said Colonel Sibthorp and the said defendant that certain freehold hereditaments in and near Bunhill Row (part of the hereditaments therein after expressed to be thereby appointed) should or might be sold at the option of the said Colonel Sibthorp at any time during his life, and that, in case of such sale, the monies produced thereby should belong in the proportions therein after mentioned to the said Colonel Sibthorp and the said defendant respectively, or their respective executors, administrators or assigns; and that the settlement to be made by the now stating indenture should, so far as related to the said freehold premises in or near Bunhill Row aforesaid, be subject to a power for effecting the said object in the manner therein mentioned: It was by the now stating indenture witnessed that in pursuance of the said arrangement, and in exercise of the several powers or authorities in or by virtue of the said two disentailing deeds respectively reserved or limited to them for that purpose, and of every other power enabling them in that behalf, the said Colonel Sibthorp and the defendant jointly directed and appointed that all the said manors and hereditaments in the said counties of Lincoln respectively, and also all such parts as were freehold of and in all the several manors and hereditaments in the said counties of Herts and Middlesex, should henceforth go, remain and be, and that the said two disentailing deeds should at all times thereafter operate and enure (but as to the hereditaments comprised in the first schedule to the now stating indenture, or such of them as were liable to the charges or incumbrances next therein after referred to, and as to any other of the hereditaments thereby appointed, which were liable to the same charges or incumbrances or any of them, subject to the

several charges or incumbrances respectively comprised or specified in the third schedule to the now stating indenture, and to any charge or incumbrance which should or might be thereafter made or created by the said Colonel Sibthorp, or which should take effect under or in further exercise of the said power by the said will of the said C. W. Sibthorp given to him of charging the estates thereby devised with the sum of 10,000*l.*, so far as the said charges or incumbrances respectively related to or affected the said premises, but not further; and also subject to all or any charges or incumbrances (if any) made and to be made on the same premises, or which should take effect under and in exercise of the several powers by the same will reserved and given to the said Colonel Sibthorp for charging the same with a jointure for any wife or with portions for younger children; and also subject as to the said premises in the said county of Lincoln contracted to be purchased by the said Great Northern Railway Company subject to such contract,) to the uses, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, agreements and declarations thereafter expressed, declared and contained of and concerning the same. And it was also witnessed that the said Colonel Sibthorp and the defendant granted and confirmed unto the said H. W. Sibthorp and R. Ellison and their heirs all the said several premises comprised in the said two disentailing deeds, to hold the same unto the said Humphrey Waldo Sibthorp and Richard Ellison their heirs and assigns, but nevertheless as to the said premises comprised in the first schedule thereto (being the premises comprised in the first disentailing deed) and as to any of the hereditaments thereby appointed which were liable to the same charges or incumbrances, subject to the several charges or incumbrances respectively specified in the said third schedule to the now stating indenture, and to any charge or incumbrance which might thereafter be made or created by the said Colonel Sibthorp or which should take effect under or in further exercise of the said power by the said will of the said Coningsby Waldo Sibthorp given or reserved to him of charging the said estates thereby devised with the sum of 10,000*l.*, so far as the same charges or incumbrances related to or affected the same premises, and also subject to all or any charges or incumbrances (if any) made and to be made or which should take effect in the same premises in exercise of the several powers by the same will reserved to the said Colonel Sibthorp for charging the same premises with a jointure for any wife and with portions for younger children. And also as to the said several pieces of land in the said county of Lincoln which had been contracted to be purchased by

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the said Great Northern Railway Company, subject to such contract, to the uses, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisos, agreements and declarations thereafter expressed, declared and contained of and concerning the same. And it was by the now stating indenture further witnessed that the said Colonel Sibthorp thereby granted and conveyed unto the said Humphrey Waldo Sibthorp and Richard Ellison and their heirs all the said several pieces of land and hereditaments which had been so as aforesaid by the said Colonel Sibthorp at any time or times purchased and added to the said hereditaments in the said county of Lincoln and in the said county of the city of Lincoln respectively thereby appointed or granted as aforesaid, and which were then incorporated with and formed part of the said hereditaments in the said county of Lincoln and in the said county of the city of Lincoln respectively, but not elsewhere, of which the said Colonel Sibthorp was seised or had power to dispose for an estate of inheritance in fee simple or for any less estate of freehold, to hold the same unto the said Humphrey Waldo Sibthorp and Richard Ellison and their heirs, to the uses thereafter expressed and declared. And it was thereby declared, that as well the joint direction, limitation and appointment, and the joint grant or assurance and confirmation so respectively made by the said Colonel Sibthorp and the defendant as aforesaid, as the grant and conveyance thereinbefore made by the said Colonel Sibthorp alone, should respectively operate and enure to the intent that the said defendant and his assigns might, during the joint lives of himself and the said Colonel Sibthorp, by and out of the said hereditaments, receive and take one clear yearly sum of 1000*l*. And to the further intent that the said Louisa Waldo Sibthorp, in case the said defendant should die during the joint lives of the said Colonel Sibthorp and Louisa Waldo Sibthorp and her assigns, might, after the decease of the said defendant, yearly during the joint lives of herself and the said Colonel Sibthorp, receive and take by and out of the said hereditaments one clear yearly sum of 1000*l*. And to the further intent that, in case the said defendant and the said Louisa Waldo Sibthorp should both die during the life of the said Colonel Sibthorp, leaving issue, the said Humphrey Waldo Sibthorp and Richard Ellison and the survivor of them, and the executors, administrators or assigns of such survivor, should receive and take by and out of the said hereditaments, during the remainder of the life of the said Colonel Sibthorp, the yearly sum of 1000*l*., the same annual sum to be applied and disposed of in or towards the maintenance or advancement of the child or children, if more than one, of the said defendant and the said

Louisa Waldo Sibthorp in such manner as therein mentioned. And as to as well the said premises hereinbefore mentioned to be by the said Colonel Sibthorp and the defendant thereby respectively appointed, or by both of them granted or assured, as the several hereditaments by the said Colonel Sibthorp solely granted or assured as aforesaid, subject to and charged with such one of the said yearly sums of 1000*l.* each, as should be for the time being payable, to the use of the said Humphrey Waldo Sibthorp and Richard Ellison, and their executors, administrators and assigns, for the term of ninety nine years; upon trusts therein declared for further securing the said yearly sums of 1000*l.*, and subject thereto to the use of the said Colonel Sibthorp and his assigns during his life in restoration, corroboration and confirmation, so far as concerned the said hereditaments thereinbefore expressed to be by the said Colonel Sibthorp and the defendant jointly appointed or assured, of the estate or interest for life of the said Colonel Sibthorp subsisting immediately before the execution of the now stating indenture; but subject to the joint powers respectively intended to be thereby exercised, and of all powers annexed to or exerciseable by or with the consent of the said Colonel Sibthorp during the continuance of such life estate or interest, and in particular the powers by the said will of the said Coningsby Waldo Sibthorp given to charge the said hereditaments thereby devised with the sum of 10,000*l.*, and also to charge the same with a jointure for any woman who should become his widow, and for portions for younger children, so far as the same several powers respectively then remained unexercised; and from and after the decease of the said Colonel Sibthorp, to the use of the said defendant and his assigns during his life; and from and after the decease of the said defendant, to the use of C. C. W. Sibthorp (the first son of the body of the said defendant) and his assigns during his life; and from and after the decease of the said C. C. W. Sibthorp to the use of the first and every other son of the said C. C. W. Sibthorp lawfully begotten severally and successively, and of the several and respective heirs male of the body and bodies of all and every such sons and son lawfully issuing; with divers remainders over, and with an ultimate limitation to the use of the said defendant his heirs and assigns.

Sir *R. Bethell*, *Thring* and *Hanson*, for the Crown.—  
First, the disentailing deeds of the 22nd and 23rd March, 1848, created estates which are a mere modification of the estate tail created by the will; therefore the testator is the

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"predecessor" within the meaning of the Succession Duty Act, 1853, and the defendant, who is his nephew, having succeeded to a life estate on the death of his father, is chargeable with duty at the rate of 3l. per cent. The 2nd section enacts that "every past or future *disposition* of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act," &c., "and every *devolution* by law of any beneficial interest in property," &c. "shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession;' and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." The word "disposition" is used in order to comprehend any number of acts, deeds, instruments or assurances, which collectively amount to a disposition of property; and the word "devolution" comprehends every transmission of property by act of law. Then, what is the effect of these disentailing deeds? That appears from the 12th section, which enacts that "where any person shall take a succession under a disposition made by himself, then, if at the date of such disposition he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of this Act, and such person shall have died during the continuance of such disposition, he shall be chargeable with duty on his succession at the same rate as he would have been chargeable with if no such disposition had been made," &c. The defendant took a life estate under a disposition made by himself: at the date of that disposition, that is on the exe-

not by himself  
 testator  
 "he" for the estate

cution of the disentailing deeds, he was entitled as tenant in tail to the property comprised in the succession expectant on the death of his father, who died after the commencement of the Act and during the continuance of such disposition. The defendant therefore answers the description of the person mentioned in the 12th section. The only question is whether the life estate reserved to the defendant by the disentailing deeds is an interest which he took under a disposition made by himself. It is submitted that it is, and for this reason—the parties to the disentailing deeds are the father and son; the former only parts with an annuity of 1000*l.* during their joint lives, and he takes back a life estate “in restoration, corroboration, and confirmation” of his original life estate. The subsequent estates are derived from the remainder in tail which the defendant, the person making the disposition, had at the time of such disposition. The defendant never acquired any beneficial interest which he would not have received under the will of the testator, and, if the disentailing deeds had never been executed, he would have been chargeable with a duty of 3*l.* per cent. on his estate tail. His life estate under those deeds is only a modification of the old succession; and the policy of the Act is, that if a successor, before he enters into the beneficial enjoyment of the succession, modifies or alters it, the estates consequent on that modification or alteration shall be subject to the same duty as the original succession would have been. It will be argued that the deed of the 22nd of March terminates in the creation of a joint power of appointment; but that is only the machinery by which the settlement is effected. It is the same as if the tenant for life and tenant in tail had acted in respect of their estates. Besides it is a well known rule of law, that when a power to declare uses is executed, the uses are read into the instrument creating

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the power, and usurp in that instrument the place of the power: *Sweeting v. Sweeting* (a); therefore, if the estates created by the deed of the 23rd of March be regarded as emanating from the power and not as derived from the interest, they would be read back into the instrument creating the power, and the only practical operation of the argument would be, that the settlement was effected by the deed of the 22nd of March instead of being effected by the deed of the 23rd of March. [*Bramwell*, B.—Suppose Colonel Sibthorp and the defendant, acting under that power, had reserved to the former the same life estate, and appointed the remainder to a stranger for valuable consideration, would succession duty have been payable on the death of Colonel Sibthorp?] It would, under the 15th section.

Secondly, it will be contended that, even if the defendant is liable to pay the duty, he is entitled to an allowance in respect of the annuity of 1000*l.* which ceased on the death of Colonel Sibthorp. By the 38th section, “where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, the Commissioners shall, upon the computation of the assessable value of his succession, make such allowance to him as may be just in respect of the value of such property.” That was intended to provide for cases where property is so settled that on the acquisition by the owner of other property a springing or shifting use arises and diverts the former property into another channel. [*Pollock*, C. B.—If the Act had been in force at the time the annuity was granted, the defendant would already have had the allowance, for he would only have been charged the duty on its value calculated with reference to its termination on the death of either party. There is a distinction between that case and

(a) 17 Jur. 123.

where a man holds white acre subject to his giving it up on taking black acre: when the event occurs he pays the duty on the property he gets, but an allowance is made for the property he relinquishes.] The difference is the same as between the operation of a condition and a conditional limitation. If an estate be given to A. and his heirs until B. shall return from Rome, the estate comes to a natural termination on the return of B.; but if the estate be limited to A. and his heirs for ever, provided that if B. shall return from Rome, A. living, the estate shall cease and go to C., that is a conditional limitation, which, when the event occurs, puts a violent termination to the antecedent estate and transfers it to another person. This annuity was not a property which the defendant was bound to “relinquish”—a term which implies that the thing relinquished continues; it was not a property of which he was “deprived,” which implies that he lost something which but for the particular event he would have retained; for whether he succeeded to a new estate or not, on the death of his father the annuity would have terminated. The case of *In re Micklethwait* (a) is distinguishable. There the covenant was not to pay the annuity *until* B. should come into possession of certain estates, but provided that event happened the covenant should cease. Under the 38th section, the successor is not entitled to any allowance unless the property is taken from him as a condition for the enjoyment of the succession. [*Pollock*, C. B.—Probably the more correct view is, that no abatement can be claimed where the property given up does not become vested in another.] Assuming that the case of *In re Micklethwait* (a) applies, the 1000*l.* a year would be taxable under the 5th section as a “succession,” by reason of the increase of

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benefit accruing to the defendant upon the determination of the charge.

*Bovill, Eccles and Phipson*, for the defendant.—If Colonel Sibthorp and the defendant, in execution of the power, had transferred the entire estate to a purchaser for valuable consideration, no succession duty would have been payable. They would have alienated the estate, not by force of the original will, but under the power created by the disentailing deed. This case, as regards the defendant, is the same as that of a sale to a purchaser. In the year 1848, Colonel Sibthorp and the defendant entered into an arrangement for the resettlement of the estates devised by Charles de Laet, as well as of the other estates, each contributing some value towards the interest he acquired. The former agreed to pay certain debts and legacies which were charged on the estate; the latter gave money's worth; and there were other stipulations which appear in the answer to the information (a). The effect of this arrangement was, not to preserve the settlement made by the will, but to create a new disposition of the property equally as if it had been sold to a third party. It amounted to a purchase for value, good as against any incumbrancer, mortgagee or creditor. [*Bramwell*, B.—If Colonel Sibthorp and the defendant had transferred the property to a stranger before the passing of the Act, it seems to me a strong thing to say that the purchaser would be liable to the duty. Sir *R. Bethell*.—That case is provided for by the 18th section, which says “that no person shall be charged with duty under this Act in respect of any interest surrendered by him or extinguished before the time appointed for the commencement of this Act.”] By the 2nd section, “every past

(a) See p. 430.

or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property," &c., shall be deemed to have conferred or to confer a succession. Then, what is the disposition by reason whereof the defendant has become beneficially entitled to this property? It is the deed of the 23rd March, 1848. The estate tail created by the will was annihilated by the deed of the 22nd March, 1848, and there remained only a joint power of appointment. [*Pollock*, C. B.—Assuming he takes under that deed, does he not take as an alienee within the meaning of the 15th section?] That section provides that where "any reversionary property expectant on death shall be vested, by alienation or other derivative title, in any person other than the person who shall have been originally entitled thereto under any such disposition or devolution as is mentioned in the 2nd section of this Act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created," &c. That only applies to cases where the reversionary interest is subsisting but vested in another person, not to cases where it has been extinguished and new interests created. It in effect says, that where there is a disposition which creates a succession the duty shall be paid upon it, whether the reversionary property remains in the person entitled under the original disposition, or has been transferred to another person. Here, at the time the deed of the 23rd March was executed, there was no reversionary property under the will, for the estate tail created by it was at an end. The property might have been transferred to a purchaser whose title would not depend on the death of any person. If twenty years had elapsed between the

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creation of the power and the execution of it, could it be doubted that the succession was derived from the latter? A person who takes under the execution of a power, takes by virtue of the authority of the power and not from the time of its creation: Sugden on Powers, vol. 2, p. 23. The defendant either takes the property under a disposition created by himself, in which case no duty is chargeable, (sect. 12); or he takes it under the joint disposition of Colonel Sibthorp and himself, the proportional interest derived from each not being distinguishable, in which case, under sect. 13, one moiety would be chargeable with duty at the rate of 1*l.* per cent. and the other moiety with duty at the rate of 3*l.* per cent. [*Bramwell*, B.—The 12th section imposes the duty “where any person shall take a succession under a disposition made by himself, if at the date of such disposition he shall have been entitled to the property comprised in the succession expectantly on the death of any person,” &c., but not in any other case. Now, assuming that the defendant takes under the deed of appointment, at the date of that disposition he was entitled to the property comprised in the succession expectantly on the death of his father.] The words are, “the property comprised in the succession;” that is, the same property. Here the property which the defendant takes under the appointment is different from that which he would have taken if the appointment had not been executed: in that case the estate would have remained subject to the uses under the will of the testator.

Then, with respect to the annuity of 1000*l.*—Reading the 38th section in connection with the other provisions, it is evident that the object of the legislature was to compel a successor to pay duty on what he acquired beyond that which he before possessed. This was not an annuity secured by bond or covenant, but an interest issuing out

of the estate. Until the death of Colonel Sibthorp the defendant had merely a portion of the estate; when that event took place he obtained by his succession the remainder, and is only chargeable with duty on that. What the succession brings to him is an estate minus that which he had before. *In re Micklethwait* (a) is an authority in point; and the Court are bound to act upon the principle there laid down, leaving the decision, if wrong, to be corrected by a Court of error.

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Sir *R. Bethell*, in his reply, was stopped by the Court.

POLLOCK, C. B.—I am of opinion that our judgment ought to be for the Crown on both points. The first question is whether defendant is chargeable with duty at the rate of 3*l.* per cent. That mainly turns upon whether his interest in the property is a “succession” under the will of the testator; and in my opinion it ought to be so considered. By the deed of the 22nd of March, and the appointment of the following day, the parties themselves in effect declare that such is the case; at least they have used certain expressions which ought to restrain them from saying anything to the contrary. They have stated what their object was; and it is apparent that the transaction is nothing more than an ordinary arrangement to keep the property from one generation to another by creating an estate tail, and that the right to succession duty is not affected by it. Therefore it seems to me that the duty is payable at the rate of 3*l.* per cent.

With respect to the annuity of 1000*l.*,—that had undoubtedly ceased, not by reason of any contingent event, but by virtue of its original constitution. It was an annuity payable during the joint lives of the father and son; there-

(a) 11 Exch. 452.



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fore on the death of the father it was no longer payable. That distinguishes this case from the case of *In re Micklethwaite* (a), for supposing the Act had been in force during the whole time, the annuity of 1000*l.* would have been charged according to its value calculated with reference to the duration of the joint lives. That does not apply to the case of *In re Micklethwait*. Here it is clear that the duty to which the recipient of the annuity would be liable would be commensurate with the time it lasted, and no more; therefore he has evidently no claim to any abatement, for he would already have had all the benefit with reference to the annuity ceasing at the time it did. It is not desirable to say more at present about the case of *In re Micklethwait*: the judgment of the present Lord *Wensleydale* seems to have proceeded chiefly on the ground that, as the Act did not in express terms say that the successor should not be exempt from the duty, he was entitled to the abatement. If a similar case should again occur, it will be the duty of the Court to examine its principle, and see whether it is one on which they can act. I do not agree with Mr. *Bovill*, that we ought to decide this case on the principle of that, and let it, if wrong, be corrected by a Court of error. In construing an act of parliament of so much importance, and with which unquestionably great pains have been taken,—for it is singularly clear, distinct, and comprehensive,—I think that we ought to give our judgment according to our own view of the case. For these reasons I think that the Crown is entitled to judgment on both points.

BRAMWELL, B.—I am of the same opinion. The facts may be shortly stated thus:—The uncle of the defendant disposed of certain property by will; the substance of which

(a) 11 Exch. 452.

disposition was that Colonel Sibthorp took an estate for life and the defendant a remainder in tail. Then, the testator being dead, Colonel Sibthorp and the defendant execute a disentailing deed, which contains a joint power of appointment. They exercise the power, and after charging the property with the sum of 1000*l.* a year, to be paid to the defendant during the joint lives of himself and Colonel Sibthorp, they grant to Colonel Sibthorp an estate for life, and also to the defendant an estate for life, with remainders in tail to the first and other sons of the defendant. At first it occurred to me that this case might be within the 2nd section of the Act; but I entertain some doubt about that, and for this reason.—If Colonel Sibthorp and the defendant had executed a conveyance for value to a purchaser, and the transaction had been completed before the passing of the Act, I cannot think that any succession duty would have been payable by the purchaser. At all events, I am not satisfied that the 18th section would obviate what to my mind would be an injustice not contemplated by the Act. Therefore I am not inclined to rest my decision on the 2nd section. With respect to the 15th section, I am disposed to agree with *Mr. Bovill* that it contemplates the case of an existing reversionary interest being transferred to some person other than the person originally entitled to it; but upon that I express no opinion. My decision does not proceed on either of those sections, but on the 12th, the argument upon which seems to me unanswerable; indeed scarcely any attempt has been made to answer it. That section says that “where any person shall take a succession under any disposition made by himself,”—and here there is a disposition under a power of appointment made by the defendant,—“then, if at the date of such disposition he shall have been entitled to the property comprised in the

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succession expectantly on the death of any person," &c., "and such person shall have died during the continuance of such disposition, he shall be chargeable with duty on his succession at the same rate as he would have been chargeable with if no such disposition had been made." Now, if this transaction be divided into two different dispositions, viz. the disentailing deed and the execution of the power of appointment, the case is the same; for it must then be ascertained what duty the defendant would have been liable to pay if the power had not been executed. So that it is only making two steps in the train of causation instead of one; and whether we look at the disentailing deed and the power of appointment as one or separate dispositions, the defendant takes under a disposition made by himself, and, in the event of either of those instruments being executed, he became liable to a duty of 3*l.* per cent. Then it was argued that the defendant took under the joint disposition of his father and himself, and the proportional interest derived from each not being distinguishable, under the 13th section he would only be chargeable with duty on one moiety at the rate of 1*l.* per cent., and on the other at the rate of 3*l.* per cent. But to my mind it is clear that the proportional interest derived from each may be distinguished. From whom does the defendant derive his life estate? Not from his father, for he had only a life estate, which he gave to himself, and so exhausted his means of granting. Therefore the defendant's interest is derived from his own estate, and upon that a duty of 3*l.* per cent. is payable.

Then comes the question on the 38th section, which seems to me very plain. The expressions there used are "*relinquish or be deprived of any other property.*" Now a person cannot relinquish or be deprived of a thing which does not exist. This annuity does not exist, for by the

hypothesis *uno flatu* it was gone. That the statute means that some property exists, which is given up, may be shewn to demonstration in this way:—Suppose that Colonel Sibthorp and the defendant, when they exercised the power of appointment, instead of giving the defendant 1000*l.* a year during the life of Colonel Sibthorp, had given Colonel Sibthorp 1000*l.* for his life, and after his death to the defendant for life, and had also given the defendant an estate for life. I know it is not likely that a person would have concurrently an estate for life and an annuity payable out of the same estate, but still it may be done. Now in that case the defendant would be bound to pay on two successions: as regards the land there would be an abatement of duty in respect of the 1000*l.* a year, and he would have to pay duty on the 1000*l.* a year. That being so, how can it be said that though he is liable for the total of these two, yet, if he gets the estate without the 1000*l.* a year, he is entitled to an abatement? The case of *In re Micklethwait* came before the Court in such a form that it could not be appealed from; and I am by no means clear that if the same case again occurred the Court ought not to consider the propriety of that decision. It is however distinguishable on this ground, that here the natural course of the annuity is pointed out—it is in truth an annuity for the life of an existing person; there it was not merely an annuity for the lives of existing persons, but determinable on a contingency, viz., one of the annuitants coming into possession of property by reason of the death of his brother without issue. Whether that is a distinction in principle it is unnecessary to determine; probably it is not, for I am inclined to think that the 39th section makes provision for that sort of double contingency. However, whether that is so or not, it is clear that the defendant is not entitled to any allowance in respect of this annuity.

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WATSON, B.—I am entirely of the same opinion. Under the will of the testator, if the case had stood there, it is clear that a succession would have been conferred, and that the defendant would have been the “successor,” and the testator the “predecessor,” within the meaning of the 2nd section of the Act. But when the defendant came of age there was a re-settlement of the property, and it was a primary object to preserve the original life estate of Colonel Sibthorp. The re-settlement was effected by the disentailing deed and the power of appointment. When the parties executed the power, they dealt first with the life estate of Colonel Sibthorp, and they declared that the estate then granted to him was in “restoration, corroboration, and confirmation” of his original life estate. Another life estate is granted to the defendant; and from whence was that derived? Not from the life estate of Colonel Sibthorp, for that remained intact, but from the defendant’s remainder. Then the 12th section says:—“Where any person shall take a succession under a disposition made by himself.” Here there was a disposition made by the defendant: upon what was it to operate; and what was it to create? It operated on the succession under the will, and it created a succession under the deed. The section proceeds:—“If at the date of such disposition he shall have been entitled to the property comprised in the succession expectantly on the death of any person,” &c. Now the defendant was so entitled on the 22nd and 23rd of March when the disentailing deed and power of appointment were executed. It would be dealing with those instruments in a very extraordinary way to say that they are not one conveyance. They are the machinery by which the estate is re-settled, and constitute one transaction. It might as well be said that a conveyance by lease and release is not one transaction,

because the lease bears date the day before the release. But assuming that they are in law two separate transactions, if Colonel Sibthorp had died the day after the appointment was executed, who would have been entitled to the estate? The defendant's estate in remainder would then have come into possession. That is clearly a case within the 12th section, and it goes on to say that "he shall be chargeable with duty on his succession, at the same rate as he would have been chargeable with if no such disposition had been made." It was argued that this was no settlement but a purchase of the estate, just as if it had been sold to a stranger. If that were so, in no case would duty be chargeable on property which is resettled. It seems to me that the 12th section was introduced for the very purpose of meeting such a case. Was there ever a deed resettling an estate in which provision was not made for the tenant in tail and the payment of debts? Taking the 2nd and 12th sections together, it is clear to my mind that this was a "succession," and that duty is payable at the rate of 3*l*. per cent.

But then it is said, that if that be so, the defendant is entitled under the 38th section to an allowance in respect of the 1000*l*. a year. To that there are two answers; first, the defendant neither "relinquished," nor was he "deprived" of the 1000*l*. a year, within the meaning of the 38th section; for it was only a charge upon the estate during the life of Colonel Sibthorp, and on his decease it was determined. The meaning of the section appears to me to apply to cases where in a family settlement a power of election is given to an eldest son as to whether he will take a particular estate, in which case another estate passes from him to a second son; or where by force of a will or deed a party loses an estate in consequence of a contingent event taking place. But

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there is another answer—this 1000*l.* a year was not a charge created by the will of the testator but by the disentailing deed of the 22nd of March; and therefore it ceased under a disposition made by the defendant himself and under which disposition he took a succession; consequently, by the 12th section, he is chargeable with duty at the same rate as he would have been if no such disposition had been made. As to the case of *In re Michlethwait*, I do not wish to throw any doubt upon it. There the party was deprived of his annuity in consequence of a contingent event taking place, viz., his coming into possession of certain estates by reason of the death of his brother without issue. He had an election, and might have retained the covenant and repudiated the estates, and kept the annuity; but not having done so, he may well be said to have “relinquished” it.

## Decree accordingly (a).

(a) The form of the decree was as follows:—“Declare that the defendant, Major Sibthorp, is chargeable with duty at the rate of 3*l.* per cent. in respect of his succession to the estates devised by the will of the testator, Coningsby Waldo Sibthorp; without any allowance in respect of the annuity of 1,000*l.* payable to him during the joint lives of himself and Colonel Sibthorp. Refer it to the Remembrancer to inquire

whether there are any and what charges and incumbrances affecting such succession. And let the Remembrancer ascertain and state the particulars of such succession and the amount of the duty payable by the defendant in respect thereof. And reserve the consideration of all further direction as to the costs of this suit until after the Remembrancer shall have made his report.”

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*Judgt. aff'd in Ex! Ch:  
441 N 355*

PAUL, Public Officer of STUCKEY'S SOMERSETSHIRE  
BANKING COMPANY, v. JOEL.

May 28.

**D**ECLARATION by indorsee against drawer of a bill of exchange, dated the 9th March, 1857, and accepted by one Bosville, for payment of 500*l.* ten months after date.

Plea.—That the defendant did not have due notice of dishonour of the bill as alleged.

At the trial before *Erle, J.*, at the last Hertfordshire Assizes, it appeared that the bill in question had been indorsed to “Stuckey’s Somersetshire Banking Company;” and that on the day after the bill became due, the London manager of the Company called at the office of the defendant and inquired whether he was within. A clerk said he was engaged, whereupon the manager wrote on a scrap of paper and sent in to the defendant the following notice:—“Bosville’s acceptance to Mr. Joel, 500*l.*, due 12th January, is unpaid: payment to Robarts Co. is requested before 4 o’clock.” The clerk who took in the notice to the defendant returned and said that “it should be attended to.”

It was objected, on behalf of the defendant, that the notice of dishonour was insufficient. The learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

*Hannen*, in Easter Term, obtained a rule nisi accordingly, against which

The holder of a bill of exchange, on the day after it became due, called at the office of J., the drawer, and on being told that he was engaged wrote on a scrap of paper and sent in to him the following notice:—“B.’s acceptance to J., 500*l.*, due 12th January, is unpaid: payment to R. & Co. is requested before 4 o’clock.” The clerk who took in the notice said “It should be attended to.” —*Held* a sufficient notice of dishonour.

Also that, under the circumstances, it was a question for the jury whether there was not a sufficient intimation that the bill was dishonoured.

*Archibald* now shewed cause.—The notice of dishonour is sufficient. It conveys an intimation that the bill has been dishonoured, and calls on the defendant for payment.



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*Bailey v. Porter* (a) is an authority in point. There a clerk of the plaintiffs, on the day the bill became due, wrote a letter to the defendant informing him that J. C.'s "acceptance, due that day, was unpaid, and requested his immediate attention to it," and that was held a distinct notice that the bill had been dishonoured. This case is stronger than that, for here the words are, "payment is requested." Upon the same principle, it was held in *Everard v. Watson* (b) that the following notice was sufficient:—"We beg to acquaint you with the non-payment of W. M.'s acceptance to J. W.'s draft of 29th December last, at four months, 50*L*, amounting with expenses to 50*L* 5*s*. 1*d*., which remit to us in course of post without fail, or pay to Messrs. E." It is true that in that case there was the additional circumstance of a claim for expenses incurred; here the request for payment equally shews that the bill has been dishonoured. The doctrine laid down in *Solarte v. Palmer* (c) was qualified in *Hedger v. Stevenson* (d), where *Parke*, B., said, "By that decision we are bound, though I am not prepared to say that I am bound by all the reasons or language of the learned Judges in giving their opinion, and therefore should myself doubt whether we could go so far as to say that it ought to appear upon the face of the instrument, 'by express terms or by necessary implication, that the bill was presented and dishonoured;' it seems to me enough if it appear by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor and not paid by him." Here the words "Bosville's acceptance is unpaid" would convey to the mind of any man of business that the bill had been

(a) 14 M. &amp; W. 44.

2 Cl. &amp; F. 93.

(b) 1 E. &amp; B. 801.

(d) 2 M. &amp; W. 799.

(c) 7 Bing. 530; in Dom. Proc.

presented to the acceptor and dishonoured. In *Solarte v. Palmer* there was nothing from which a presentment to the acceptor could be inferred. [*Pollock*, C. B.—There was merely a letter from the plaintiff's attorney threatening legal proceedings if the bill was not paid; and all the case decided was that notice by the attorney in the terms in which it was there given was not sufficient. It should have been left to the jury to say whether the notice conveyed a sufficient intimation that the bill had been presented and dishonoured.] At all events, the paper sent in to the defendant was accepted as a notice, for the answer given was that "it should be attended to."

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*Hannen*, in support of the rule.—The decision in *Solarte v. Palmer* did not depend on the fact of the notice being merely a letter from the plaintiff's attorney, but on the question whether the notice itself was sufficient. Consistently with that case, this notice cannot be held sufficient. There the notice was:—"A bill for 683*l*., drawn by K. upon Messrs. D. & Co., and bearing your indorsement, has been put into our hands by the assignees of A., with directions to take legal measures for the recovery thereof unless immediately paid to, Gentlemen, Yours, &c., J. & S. P." There the notice contained all that is found in the present notice, viz. a demand of payment; and the decision, both in the Exchequer Chamber and the House of Lords, proceeded on the ground that there was nothing to shew that the bill had been presented for payment and dishonoured. In *Everard v. Watson* (a) Lord Campbell expressed his regret at the decision of *Solarte v. Palmer*, but at the same time said, "It is, however, a decision which we cannot reverse, indeed I fear the House of Lords could not do so." The case corresponding with the present is *Strange v.*

(a) 1 E. &amp; B. 801.

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*Price* (a). There the notice was :—Messrs. S. & Co. inform Mr. P. that Mr. B.'s acceptance, 87*l.* 5*s.*, is not paid. As indorsee, Mr. P. is called upon to pay the money, which will be expected immediately; and that was held insufficient. *Littledale, J.*, there said : "To persons in general, perhaps a notice like this would convey the requisite information ; but if we are to lay down a rule on the subject, we must say that such a notice is insufficient. It is not said that the bill has been dishonoured, or returned ; consistently with the language used, it might never have been presented, and have remained unpaid by reason of the holder's laches." *Bailey v. Porter* (b) is distinguishable : there the bankers at whose house the bill was made payable were themselves the holders at its maturity, and therefore notice that the bill was not paid involved notice of presentment : Byles on Bills, p. 183, 7th ed. In *Allen v. Edmundson* (c) *Parke, R.*, said that "though the strictness of the rule laid down in *Solarte v. Palmer* has been modified, particularly by this Court in *Bailey v. Porter*, still a notice of dishonour requires a certain formal intimation that the bill has been duly presented and not paid, and that the party giving notice means to hold the other party liable." [*Pollock, C. B.*—*Solarte v. Palmer* is a binding authority as a decision, but it is not binding as to the reasons given for it ; therefore it is no authority that the notice must shew, either by *express terms* or *necessary implication*, that the bill has been presented and dishonoured. The true criterion is stated by Lord *Campbell* in *Everard v. Watson*.] In *Furze v. Sharwood* (d), where several notices similar to the present were held insufficient, Lord *Denman* said, "If we are to refer the question to a reasonable intendment, and what a man of business would naturally conclude from the words, we

(a) 10 A. &amp; E. 125.

(b) 14 M. &amp; W. 44.

(c) 2 Exch. 719.

(d) 2 Q. B. 388. 415.

can hardly decide it without the intervention of a jury, whose opinions will naturally vary with the circumstances of each case." There was no evidence that this was accepted as a notice. The clerk said "it should be attended to," but that might mean that the "notice shall be attended to." Besides, though a clerk may have authority to receive a notice of dishonour, he is not an agent to promise payment.

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POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. No doubt when first the case of *Solarte v. Palmer* was decided it was regretted, but it was followed by other decisions supposed to be founded on its authority, and amongst them that of *Strange v. Price (a)*, where Lord Denman expressed a doubt as to the reasoning on which *Solarte v. Palmer* turned; but considered the decision as binding. Pattenon, J., said he thought that *Strange v. Price* might by possibility be distinguished from *Solarte v. Palmer*, and was anxious that it should be discussed; but no real distinction could be drawn. At length, after several cases following what was thought to be the decision in *Solarte v. Palmer*, it became apparent that if that state of things continued considerable injustice would be done, and that it would be necessary for merchants and men of business to alter their universal practice,—indeed, as observed by a merchant at the time of that decision, no person could safely send a notice of dishonour without an attorney or a draftsman at his elbow. The doctrine laid down in *Solarte v. Palmer* that the notice "should at least inform the party to whom it is addressed, either in *express terms* or by *necessary implication*, that the bill has been dishonoured," is no part of the decision which is binding on us. I agree with what was said by Lord Campbell in *Everard v. Watson (b)*,

(a) 10 A. & E. 125.

(b) 1 E. & B. 804.

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that "in the case of mercantile instruments it is peculiarly important that we should maintain the efficiency of words according to the ordinary usage of language." The case of *Bailey v. Porter* is a direct authority that this notice is sufficient. There the cases of *Solarte v. Palmer* and *Strange v. Price* were cited; but the Court, after taking time to consider, held that the notice gave distinct information that the bill had been dishonoured. I do not think that there is any material difference between the expressions in that notice and the saying, as in this, that "the bill due is unpaid and payment is requested." Any person of common understanding would predicate that the bill had been presented for payment and dishonoured. Then there are the additional circumstances that the bill was taken to the office of the defendant on the proper day for giving notice of dishonour; that the person who brought it wrote on a paper that the bill was unpaid, and requested payment before 4 o'clock. That was delivered to a clerk to take to the defendant. The clerk returned and said,—“It shall be attended to.” That was some evidence from which a jury might infer that the defendant would pay it. It is true that it might mean nothing more than that “the notice shall be attended to;” but it might mean something more, and it would have been proper to leave it to the jury to consider whether, under all the circumstances, the defendant had not reasonable information that the bill had been presented and dishonoured, and that he was called upon to pay it. However the only question reserved at the trial was whether the notice was sufficient, and I think it was.

MARTIN, B.—I am of the same opinion. It seems to me that the case of *Bailey v. Porter* is directly in point. There a clerk of the plaintiff's, on the day the bill became due, wrote a letter to the defendant stating that the “acceptance

due that day was unpaid, and requesting his immediate attention to it." This Court in a considered judgment said that the notice appeared to them "a distinct notice that the bill had been dishonoured, and that the expression in it requesting his immediate attention to it must be understood by any person acquainted with business as directing the indorser's attention to the bill, and calling upon him to pay the amount of it." If I had to decide this case independently of that, I should concur in every word of the judgment; but it is sufficient to say that there is a decision of this Court, subsequent to those cited by the defendant, directly in point. It is argued that there are circumstances in that case which distinguish it from the present: I think they do not. Stress has been laid on the fact that there the bill was accepted payable at the bankers who were the holders of it at its maturity; but the Court founded their judgment upon the true meaning of the expressions contained in the notice. I think that is not so strong a case as the present, because here the notice was sent in to the defendant, and an answer was returned that "it should be attended to." It is said that is a question for the jury; but, assuming those circumstances did not exist, it is impossible not to see that the notice in this case is identical with that in *Bailey v. Porter*.

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BRAMWELL, B.—I am also of opinion that the rule ought to be discharged. I cannot say that *Bailey v. Porter* governs this case, because it seems to me distinguishable on the ground pointed out by Mr. *Hannen*. There the bill was accepted payable at the bank of the plaintiffs, and on the day it became due they were the holders of it; therefore they could not present it to themselves; and if they had no effects of the acceptor in their hands it was inevitably dishonoured. But I am prepared to discharge this rule on

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another ground. As to the case of *Solarte v. Palmer*, I agree that, even supposing the House of Lords could reverse its own decision, we cannot. But in the case of *Bright v. Hutton* (a) the House of Lords considered that they were not bound by their erroneous decision on a question of fact. That prevents us being bound by an erroneous decision of the House of Lords on a question of fact; and I cannot help thinking that this must be a question of fact. We cannot inquire into the effect of the instrument on the mind of any particular individual, but whether it gives to people in general notice that the bill has been presented and dishonoured. Suppose a notice was in these terms:—"I demand payment of a bill of which A. is the drawer and you are the acceptor for 100*l.*, and which amount you owe me;" does not that convey as strong an intimation of notice of dishonour as if there had been a demand of 1*s.* 6*d.* for noting? I think it does. Here the notice does not in terms say that the defendant owes the money, but when payment is demanded it is equivalent to saying "you owe me the money." A "request" amounts to the same thing: it indicates that the party, as a matter of right, requests that the money may be paid. According to *Solarte v. Palmer*, I should be prepared to hold, if necessary, that in every case where the request for payment was made on the proper day, the jury ought to be asked whether that did not by necessary implication convey to the party requested notice that the bill had been dishonoured. In my opinion that is the principle which we had better at once boldly adopt, rather than attempt to get over that decision from a desire to do substantial justice. Certainly that is what I should be inclined to do, but in this particular case we need not go so far. I agree with Mr. *Hannen* that the defendant's clerk was not

(a) 3 H. L. 341, 388.

his agent to make any admission; but he was his agent to receive the notice, and if what took place affected the mind of the defendant with notice, that is enough. Now the manager of the bank goes to the defendant's office, writes the notice on a piece of paper and sends it in to the defendant. Instead of the defendant saying, "What does this mean? I do not understand that the bill has been dishonoured:" he says, "It shall be attended to," which means "I will pay it." I hold, therefore, that in this particular case there was evidence for the jury, according to the law as laid down in *Solarte v. Palmer*, that the notice so given conveyed an intimation that the bill had been presented and was dishonoured. And I am prepared to go further, and say that in every case where a demand of payment is made on a drawer or indorsee by the holder of the bill on the proper day, it ought to be left to the jury to say whether, under the circumstances, there was sufficient notice of dishonour.

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Rule discharged.

## MARTIN v. THE LEICESTER WATERWORKS COMPANY.

June 4.

THE declaration stated that, before and at the time of the making of the agreement hereinafter mentioned, the defendants were a corporation established and incorporated by act of parliament for the purpose of better supplying with water the inhabitants of the borough of Leicester,

A person claiming compensation under a Waterworks Act, which incorporated the Lands Clauses Consolidation Act, 1845,

agreed with the Company to appoint as sole arbitrator, for the purpose of settling the amount of such compensation, a person to be nominated by two others. They accordingly nominated an arbitrator who awarded to the claimant a sum exceeding 50*l*.—*Held*, that the claimant was entitled to the costs of the arbitration although no offer had been made by the Company, or the other preliminaries mentioned in the statute complied with.



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&c.; and it was by the special act of parliament relating to the said Leicester Waterworks Company enacted (a), "that all persons interested in the water mills situate on the stream flowing from the reservoir thereby authorized to be made at or near Thornton in such special act mentioned, and lying above the junction of such stream with the river Soar or Leicester navigation, should be entitled to pecuniary compensation for or in respect of any injury they might respectively sustain by the abstraction of water for the purposes of the said undertaking; and that the amount of such compensation should, in case of disagreement between the Company and such persons respectively, or any of them, be settled by arbitration in manner provided by the 'Lands Clauses Consolidation Act, 1845,' in cases of disputed compensation." And the plaintiff, before and at the time of the making of the said agreement, was possessed of a certain water mill, called the Anstey Mill, situate on the said stream flowing from the said reservoir at or near Thornton aforesaid, and lying above the junction of such stream with the said river Soar or Leicester navigation, and interested in such mill, to wit, as owner thereof, and by reason thereof and of the premises was entitled to compensation from the defendants for and in respect of injuries sustained by him by the abstraction of water by the defendants for the purposes of the said undertaking: but the defendants, before and at the time of the making of the said agreement, had not made any satisfaction to the plaintiff in respect of such compensation, and a disagreement had arisen between the defendants and the plaintiff respectively as to the amount of such compensation; and thereupon, to wit, on &c., by a certain agreement made and entered into by and between the plaintiff and the defendants, after reciting (inter alia) that the plaintiff claimed

(a) 10 & 11 Vict. c. cclxxxii., s. 41.

to be a person interested in the said water mill within the meaning of the 41st section of the said Leicester Waterworks Act, 1847, and to be entitled to a sum of money exceeding the sum of 50*l.* as pecuniary compensation for and in respect of injury sustained by him by the abstraction of water for the purposes of the undertaking in the said act of parliament mentioned; and also reciting, as the fact was, that a disagreement existed between the plaintiff and the Leicester Waterworks Company as to the amount of such compensation: and also reciting, as the fact was, that the parties thereto had mutually agreed to appoint as sole arbitrator, for the purpose of ascertaining and settling the amount of such compensation, a person to be nominated by K. Macaulay and J. Mellor, and that the said K. Macaulay and J. Mellor had accordingly nominated G. Hayes for that purpose: they, the Leicester Waterworks Company and the plaintiff, did thereby, in performance of the said therein recited agreement and in pursuance of the provisions of the "Lands Clauses Consolidation Act, 1845," and of the Acts above referred to, appoint the said G. Hayes to act as sole arbitrator, on behalf both of the said Company and of the plaintiff, to ascertain and settle the amount of such disputed compensation.—Averments: that the agreement was signed by the plaintiff and J. Loseby, the clerk of the Leicester Waterworks Company and on their behalf, and was duly sealed with the seal of the Company: that the said G. Hayes, in pursuance of the powers contained in the said agreement, having taken upon himself the burthen of the said arbitration, did, in due manner and in pursuance of the powers vested in him by the said agreement and other powers enabling him in that behalf, and within three calendar months from the time he was so appointed arbitrator as aforesaid, and in accordance with the provisions of the "Lands Clauses Consolidation Act,

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1845," to wit, on &c., duly make and publish his award in writing under his hand and seal of and concerning the matters in difference between the plaintiff and the defendants so referred to him as aforesaid: and, after reciting the said agreement, did by his said award then award, ascertain, settle and determine that the amount of compensation due and payable from the said Company to the plaintiff for and in respect of the injury sustained by him as owner of the said mill called the Anstey Mill, by reason of the abstraction of water by the Company for the purpose of the said undertaking, was and should be the sum of 440*L.*, which said sum so awarded as aforesaid exceeds the sum of 50*L.*, and was and is a much larger sum of money than was ever offered by the defendants to the plaintiff for and in respect of such compensation as aforesaid. And afterwards, to wit, on &c., and before the commencement of this suit, the said G. Hayes, as such arbitrator as aforesaid, had notice of the premises, and afterwards according to and in compliance with the provisions of the "Lands Clauses Consolidation Act, 1845," by writing under his hand, at the request of the plaintiff, settled the costs of the plaintiff of and incident to the said arbitration to amount to, and the same when so settled amounted to, the sum of 107*L.* 14*s.* 2*d.*; of all which the defendants had notice before the commencement of this suit, and have been requested to pay the same. Breach.—That although all things have been done and have happened to entitle the plaintiff to have the said costs so settled by the said arbitrator paid to him by the defendants, yet the defendants have not paid the said sum of 107*L.* 14*s.* 2*d.*, &c.

Plea.—That the plaintiff did not, at any time before the alleged submission to arbitration, give notice in writing to the defendants of his desire to have the compensation claimed by him settled by arbitration, or state in any such,

or in any other notice to the defendants the nature of the interest in respect of which he claimed compensation, and did not state in any notice to the defendants the amount of compensation claimed by the plaintiff in respect of the alleged injury; and the plaintiff at all times omitted, and though requested on behalf of the defendants so to do, refused to state the amount of compensation claimed by him; and by reason thereof the Company were at all times ignorant of the amount of injury (if any) sustained by the plaintiff or of the compensation which the Company ought to pay or offer, and therefore the Company could not and did not offer any sum or compensation to the plaintiff; and there was not any disagreement as to the amount of compensation payable to the plaintiff; nor was the case between the plaintiff and the Company a case of disputed compensation within the meaning of the "Lands Clauses Consolidation Act, 1845," or of the said Leicester Waterworks Act, 1847, section 41; and the said arbitration was in truth an arbitration at common law and not by virtue of the said "Lands Clauses Consolidation Act, 1845;" and the said submission did not express or provide that the plaintiff should in any event be entitled to have any costs settled by the said arbitrator, or to have any costs paid by the defendants; and the plaintiff was not entitled to have his costs of and incident to the said arbitration settled by the said arbitrator or paid by the defendants; and therefore the defendants have not paid the same.

Replication.—That after the said alleged omission and refusal of the plaintiff to state the amount of compensation claimed by him, and before the said arbitration was entered upon or commenced, the defendants and the plaintiff made and entered into the said agreement, whereby and by reason whereof the defendants exonerated and discharged the plaintiff from giving notice to the defendants of his desire

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to have the compensation claimed by him settled by arbitration, and from stating in such notice or otherwise the nature of the interest in respect of which he claimed compensation, or the amount of such compensation; and also by reason thereof then waived and exonerated the plaintiff from taking all or any of the preliminaries required by the statutes previous to the entering upon the said reference under and by virtue of the said statutes. And the arbitration was in truth an arbitration under and by virtue of the said statutes, and not an arbitration at common law.

The plaintiff also demurred to the plea; and the defendant demurred to the replication.—Joinders therein.

*Wilde (Phipson and Bell with him)* argued for the plaintiff (June 2).—The declaration is good and the plea bad. This is an award under a submission reciting that the plaintiff is entitled to compensation under the “Leicester Waterworks Act, 1847” (10 Vict. c. cclxxxii.). The first section of the Act incorporates the “Lands Clauses Consolidation Act, 1845” (8 & 9 Vict. c. 18); and the 41st section provides that all persons interested in the water mills situate on the stream flowing from the reservoir thereby authorized to be made, &c., shall be entitled to pecuniary compensation in respect of any injury they may sustain by the abstraction of water for the purposes of the undertaking; and that the amount of such compensation shall in cases of disagreement be settled by arbitration in manner provided by the “Lands Clauses Consolidation Act, 1845.” By the 25th section of that Act “when any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorized or required to be settled by arbitration, shall have arisen, then unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other

party, shall nominate and appoint an arbitrator to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking under the hands of the said promoters, or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, &c.; and such appointment shall be delivered to the arbitrator and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made," &c. By section 34, "all the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions." The plea sets up as an answer that the plaintiff is not entitled to costs, because no provision is made for them in the submission, and this is not a case of disputed compensation within the meaning of those Acts, inasmuch as the preliminaries necessary to a statutory reference have not been complied with. But the plaintiff had a right to pecuniary compensation under the special Act; and by the 68th section of the Lands Clauses Consolidation Act, 1845, "If any party shall be entitled to any compensation, &c., for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, &c., and if the compensation claimed in such case shall exceed the sum of 50*l*., such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his

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desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided." The section goes on to say that in case the party desires to have the compensation settled by a jury he may give a similar notice. The object of the notice is to inform the promoters of the undertaking that the party has made his election: where both parties agree that the compensation shall be settled by arbitration, no notice is necessary. The 23rd and 25th sections apply to cases where there is a dispute as to the amount of compensation claimed or offered, which is to be settled by compulsory arbitration, not to a case where both parties agree to appoint an arbitrator. *Collins v. The South Staffordshire Railway Company (a)* is an express authority to that effect. *Pollock, C. B.*, there said:—"There can be no necessity for a perfect compliance with all the statutory forms where both parties concur in the appointment of an arbitrator. The notices required by the Act can only be necessary where no option is exercised and it is doubtful what the claimant may require; but where the parties agree to refer according to the statute, and that agreement is acted on, it is sufficient if the appointment of an arbitrator on the part of the Company is signed by the secretary." *Regina v. Biram (b)* shews that the costs may be awarded by a separate instrument.

*Aspland*, for the defendant.—The plea is good, and the declaration and replication bad. *Collins v. The South*

(a) 7 Exch. 5.

(b) 17 Q. B. 969.

*Staffordshire Railway Company* (a) has no bearing on this case, for there the declaration alleged both a notice by the party requiring compensation and an offer by the promoters of the undertaking. Here there has been no notice or offer. In *The South Eastern Railway Company v. Richardson* (b), the judgment proceeded on the ground that an offer had been made by the Company, and *Parke, B.*, observed that it was unnecessary to say what the decision would have been if no offer had been made. [*Wilde* referred to the 51st section.] That section is in pari materia with the 34th: the one relates to the costs of inquiry before a jury, the other to the costs of arbitration. Under the 51st, the party is not entitled to costs unless the jury give a verdict for a greater sum than that previously offered; so, under the 34th, there must have been an offer to entitle the party to costs. The 68th section simply provides for notice being given. [*Bramwell, B.*—The parties agree to refer upon the terms of the Lands Clauses Consolidation Act, 1847, and under the 34th section the right to costs would seem to depend on an offer having been made.] Where a railway Act contained a clause that, in case of disputed compensation, the matter should be referred to a jury, with the usual provisions as to costs, but the parties, instead of proceeding under the Act, agreed that the amount of compensation should be settled by arbitration, and the submission was silent as to costs, it was held by *Coleridge, J.*, that the party in whose favour the award was made was not entitled to costs: *Ex parte Reynall* (c). In *Richardson v. South Eastern Railway Company* (d), *Jervis, C. J.*, observed in the course of the argument, that “possibly the legislature may have intended to compel the promoters in every case to make a tender for the purpose of

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(a) 7 Exch. 5.

(c) 16 L. J. Q. B. 304.

(b) 15 C. B. 810, 821.

(d) 11 C. B. 154, 164.



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making the clauses as to costs apply." Moreover, if there was any power to award costs, they should have been settled by the same instrument. That may not be necessary where the arbitration is strictly in accordance with the Act, but it is requisite in this case.

*Wilde* replied.

*Cur. adv. vult.*

POLLOCK, C. B., now said.—The question in this case was whether the arbitrator, to whom a claim for compensation under the Leicester Waterworks Act had been referred by agreement between the parties, had any power to award costs to be paid by the defendants. We are of opinion that he had. We think that this was not a reference under the Lands Clauses Consolidation Act, 1845, but a general reference in accordance with its provisions, so as to entitle the plaintiff to costs.

BRAMWELL, B.—I wish to say why it was that I entertained any doubt, and in what way I have come to the same conclusion as the rest of the Court. It appears to me that this is not a compulsory arbitration under the Lands Clauses Consolidation Act, because, in that case, either the two parties concur in the appointment of the same arbitrator, or one nominates one arbitrator and the other another. There is no such appointment or nomination here; for both parties agree that two persons named shall nominate an arbitrator. That is not a proceeding under the statute: there is no appointment of an arbitrator under the seal of the Company, but the introduction of an arbitrator by agreement between the parties. The case of *Collins v. The South Staffordshire Railway Company* (a) shews that it was competent for the parties to refer on the same terms as a compulsory reference under the statute. Then a doubt arose in

(a) 7 Exch. 5.

my mind whether in that case the right to costs did not depend on an offer of some sum having been made. But on minute examination of the statute I am satisfied that *Mr. Wilde* is right. Section 34 says that all the costs of the arbitration shall be borne by the promoters of the undertaking, *unless* the arbitrator shall award the same or a less sum than shall have been offered. It occurred to me that the statute contemplated that there must be a sum offered; but, on looking at the other part of the Act, I think that if, on a compulsory reference under the statute, the promoters do not offer any sum, they must inevitably pay the costs. If they do offer a sum sufficient, then they have only to pay the sum awarded, without costs. But I think that section 34 was incorporated into the agreement of the parties.

Judgment for the plaintiff.

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Sir JOHN MORRIS, Bart., and LOCKWOOD v. THE  
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May 28.  
*Indy. & H. in Error*  
3 H. & N. 885

**EJECTMENT** to recover possession of mines under certain lands in the parishes of Swansea and Bishopstone in the county of Glamorgan.

An indenture of settlement contained a power for the tenant for life to lease

for lives the hereditaments to any person willing to build houses thereon: Also a power to lease for sixty-three years the coal mines under the lands "with all such powers, authorities, accommodations, liberties, and privileges as shall be necessary or are usually contained in leases of collieries or mines in the county, place, or neighbourhood where the collieries intended to be demised are or shall be situate, for seeking, winning, working, drawing, taking and carrying away the coals; so as the lessees be not made punishable for waste by any express words therein contained. In execution of this power the tenant for life granted a lease which contained a power for the lessee "to erect, build and construct, and set up in and upon the said mines, lands and premises, all such engine-houses, machine offices, counting-houses, warehouses, store-rooms, workshops, workmen's cottages, huts, &c., erections, buildings and accommodations as shall be bonâ fide necessary or proper for or in the due prosecution and carrying on of the said works." There was also a power to dig and use stones, slate, brick earth and materials in any part of the land which should be required for the collieries or for any building thereby authorized to be made in the exercise of any power thereby granted. Ejectment having been brought to recover possession of the coal mines on the ground that the lease was not a due execution of the power, the jury found that a power to build cottages in places convenient with reference to the works was both necessary and usual in leases of collieries in the neighbourhood.—*Held*: First, that the lease was not in excess of the power.

Secondly, that the lease was not void on the ground that the power to build was in violation of the provision in the settlement that the lessees should not be made punishable for waste.

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At the trial before *Bramwell*, B., at the last Glamorgan-shire Assizes, the following facts appeared:—By indenture of settlement of the 8th June, 1819, the lands under which the coal mines in question were situate were conveyed by Sir John Morris, the then owner, to the use of himself for life and after his decease to the use of his son, John Morris, for life with remainders over. This indenture contained a power to lease such part of the hereditaments as were then leased for lives, or for years determinable on the dropping of lives, to any person for a similar term. Also to lease any part of the hereditaments to any person for one, two or three lives, either with or without a term of years not exceeding fifty; or for any number of years determinable on the dropping in of one, two or three lives either in possession or reversion. The indenture also contained the following powers:—

That it shall and may be lawful to and for the said Sir John Morris from time to time during his life, and after his decease then to and for the said John Morris, to demise or lease all or any of the hereditaments to any person or persons who shall be willing and shall actually covenant and agree to improve the same by erecting or building thereon any new house or houses, erections, or buildings, or to rebuild or repair any of the messuages, tenements, erections or buildings which now are or hereafter shall be on the premises, and to expend such sums of money in improvements as shall be adequate consideration for the interest to be parted with or granted by such leases respectively in the hereditaments so to be demised respectively, for one, two or three such lives as aforesaid, and either with or without any term of years not exceeding fifty, &c. And also to demise the hereditaments for any term of years not exceeding twenty-one. And also to demise and lease to any person or persons whomsoever for any term of years not exceeding sixty-three, to take effect in possession, &c., all

or any part of the collieries, coal mines, seam or seams of coal, or other mines and minerals whatsoever, opened or unopened, lying and being in, within, or under all or any of the lands hereinbefore granted, together with all such powers, authorities, accommodations, liberties and privileges as shall be necessary or are usually contained in leases of collieries or mines in the country, place, or neighbourhood where the collieries or mines intended to be demised by virtue of this power are or shall be situate, for seeking, winning, working, drawing, taking and carrying away the coals and minerals within and under the same, &c.: so as the lessees be not made dispunishable for waste by any express words therein contained.

Sir John Morris died in the year 1819, leaving John Morris, his eldest son, him surviving. John Morris died in the year 1855, leaving the plaintiff, his eldest son, him surviving, and tenant for life under the trusts of the above indenture, subject to an unsatisfied term of 1000 years which is in the plaintiff Lockwood.

By indenture of the 1st January, 1840, reciting the above indenture of settlement by Sir John Morris, his son, John Morris, demised the coal mines in question to George Morris. This indenture contained the following power:—And also full and free liberty, power and authority to and for the said G. Morris, his executors, administrators and assigns, and his and their workmen to seek for, win, work, draw, take and carry away the coal, &c. And also to erect, build and construct, and set up in and upon the said mines, lands and premises all such engine-houses, machine-offices, counting-houses, warehouses, store-rooms, workshops, workmen's cottages, stables, huts, hoods, hovels, sheds, bridges, walls, erections, buildings, and accommodations as shall be bonâ fide necessary or proper for or in the due prosecution and carrying on of the said works and

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premises. And also full and free liberty to and for the said G. Morris, his executors, &c., and his and their agents and workmen, to dig and raise and use building or other stones and slates, brick earth and materials on any part of the said lands and hereditaments, and make the same into bricks, or otherwise to prepare the same for building with or otherwise using the same, and which shall be required for the purposes of the said collieries and works or for any erection or building hereby authorized to be made in or about the exercise and enjoyment of any liberty, power or authority hereby granted or given.—The lease contained a covenant by the lessee that he would not (amongst other things) sink any pit or build any house or building of any description, nor do any other act on the surface of the hereditaments within the distance of 200 yards from the mansion-house.

George Morris granted an underlease of the mines to the defendants, who built a number of workmen's cottages.

The estate consists of about 1,500 acres of land, with a mansion-house, park and grounds, and ornamental timber thereon; and parts of it are valuable for building purposes. There are veins and seams of coal under the estate capable, as to 500 acres of surface, of being profitably worked; and there are, within one mile and a half from the mines opened, many acres of land, not forming part of the estates, fit for building cottages for the men employed in working the mines.

It was objected, on behalf of the plaintiffs, that the lease of the 1st January, 1840, was not a due execution of the powers contained in the settlement of the 8th June, 1819. The defendants' counsel then tendered evidence of the contents of leases by proprietors of coal mines in the neighbourhood, containing powers for building workmen's cottages. This evidence was objected to, but received by the learned


Judge. It was also objected by the plaintiffs' counsel that the power to build contained in the lease was in violation of the provision in the settlement, that the lessee should not be made punishable for waste.

The learned Judge left to the jury the following questions:—First, assuming the true construction of the lease of 1840 to import an unrestricted power to build cottages everywhere all over the estates, except within 200 yards of the dwelling-house, was such a power necessary? Secondly, assuming the true construction of that lease to import a restriction of the power to build cottages to places convenient in reference to the works, was such a power necessary? Thirdly, assuming the construction of the lease as in the first question, was such a power usual? Fourthly, assuming the construction as in the second question, was such a power usual? The jury found the first and third questions in the negative and the second and fourth in the affirmative. The learned Judge directed a verdict for the defendants, reserving leave to the plaintiffs to move to enter the verdict for them.

*Grove*, in last Easter Term, obtained a rule nisi accordingly, against which

*Evans* and *Giffard* now shewed cause (a).—The lease is not in excess of the power. The general words, “with all such powers, authorities, accommodations, &c., as shall be necessary or usually contained” in leases of collieries in the neighbourhood, are not qualified by the words “for seeking, winning,” &c. the coal. The case is concluded by the finding of the jury, that a power to build cottages in places convenient in reference to the works was necessary and usual. But assuming that the lease contains something in excess of the power, it is not therefore altogether void.

(a) Before *Pollock*, C. B., *Martin*, B., and *Bramwell*, B.

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The Court then called on

*Grove and Pulling* to support the rule.—The lease is void. First, it is in excess of the power. The settlement contains an express power to grant building leases for a term not exceeding fifty years. Then follows a power to lease the coal mines for a term not exceeding sixty-three years, with a grant of such powers, authorities, accommodations, &c., as are necessary or usual for seeking, winning, working, &c. the coal. If the tenant for life can build without resorting to the former power, the object of the settlor will be frustrated. Powers which are in derogation of the rights of a reversioner must be strictly pursued by the tenant for life: *Hawkins v. Kemp* (a), *Doe d. Bartlett v. Rendle* (b). Where there is a complete execution of a power and something in excess of it, as where a man having a power to lease for twenty-one years, leases for forty, that is good in equity pro tanto, and the excess alone is void; but at law the lease is altogether void: *Sugden on Powers*, vol. 2, p. 75, 7th ed. Here it would be necessary to go to a Court of equity to modify the terms of the lease. The liberty to build warehouses, workshops, and workmen's cottages cannot be imported into the power. By this excess of the power the lessee is enabled to build without restriction; but the power only authorizes such accommodations as are strictly necessary for the convenient working of the coals: *Earl of Cardigan v. Armitage* (c). [*Martin, B.*—This is a lease of a coal mine with liberty to get the coal; and supposing the building of cottages is in excess of the power, is there any authority that because the lessor professes to grant a right over the surface not warranted by the power, the lease of the mine is void? *Pollock, C. B.*—An award is merely the

(a) 3 East, 410, 430.

(b) 3 M. & Sel. 99.

(c) 2 B. & C. 197, 211.

execution of a power; and it has been decided that it may be good in part and bad in part.] *Doe d. Bartlett v. Rendle* (a) is an authority that the lease is altogether void. —Secondly, the power to lease is subject to the condition that “the lessees be not made dispunishable for waste by any express words therein contained.” This lease in express terms enables the lessees to commit waste, not that which is incidental to the working of the mine, but which extends over the whole premises. They may build over the entire 1,500 acres of land except within 200 yards of the mansion-house. *Doe d. The Earl of Egremont v. Burrough* (b) and *Yellowly v. Gower* (c) are authorities that the lease is void on this ground.

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POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. I do not think there would be any difference of opinion among lawyers as to the doctrine with reference to the execution of this power; but, looking to what occurred some twenty or thirty years ago in a case known as the *Jersey Case* (d), one ought not to be too positive as to the law on this subject. I say too positive, because in that case there was a wide difference of opinion amongst eminent Judges. The Court of King’s Bench gave a judgment which was reversed by the Court of Exchequer Chamber and affirmed in the House of Lords by a majority of nine against five, one learned Judge (e) having changed his opinion. In that case there was a power of leasing for lives, at the ancient and accustomed yearly rents, such parts of the estates as were then let for lives or for years determinable on lives, provided every such lease

(a) 3 M. & Sel. 99.

(b) 6 Q. B. 229.

(c) 11 Exch. 274.

(d) *Doe d. The Earl of Jersey*

*v. Smith*, 7 Price, 281, 379; 3

Bligh. 290; 2 B. & B. 473; 3

Moore, 339.

(e) Richards, C. B.



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contained a power of re-entry for non-payment of the rent. There was also a power to demise all the estates for a term not exceeding twenty-one years at the best yearly rents, provided every such lease contained a clause of re-entry in case the rents were unpaid for the space of twenty-eight days. The tenant for life granted a lease of certain premises which had been formerly let for years determinable on lives, and this lease contained a power of re-entry if the rent should be unpaid for the *space of fifteen days, and no sufficient distress could be had on the premises.* There was a great difference of opinion as to whether that was a valid execution of the power, but finally the House of Lords held that where a power of re-entry is silent as to the time and conditions, a reasonable time and qualification may be introduced. Here the question is more a matter of fact than of construction, except that it is a question of construction whether those matters which are permitted by the language of the power are to be strictly limited to the immediate object, or are to be enlarged to things necessary and by which access or aid is afforded to that object. The language is, "to demise and lease to any person &c. all or any part of the collieries &c., together with all such powers, authorities, accommodations, liberties and privileges as shall be necessary or are usually contained in leases of collieries or mines in the country or neighbourhood where the collieries or mines intended to be demised are situate." Therefore if the powers are usually found in such leases, that is enough. Again, the exigencies of the locality, increased demand for coal, or other circumstances, may render new accommodation necessary, and in that case it shall be lawful to provide for the altered circumstances of mining by giving powers which are not usual. Then follows the expression, "for seeking, winning, working, drawing, taking and carrying away the coals and minerals" &c. If the

collieries were far remote from any habitable dwelling, it would be impossible for the miner to walk a distance and back in the evening, exhausted as a labourer generally is by toil; and therefore it would be necessary to provide an adjacent place where he might sleep. Then, is not that "necessary" for the working of the coal without which the coal cannot be worked? That is the ground upon which I decide against the plaintiffs; for after listening to the able and ingenious argument of their counsel, I must confess they have failed to convince me of the correctness of their proposition. I am of opinion that we ought to construe this instrument in this way—that whatever cannot be dispensed with, or without which the mine cannot be worked, not merely not at all, but with reasonable efficiency and success, then that matter is "necessary" within the meaning of this power.

MARTIN, B.—I am also of opinion that the rule ought to be discharged. There are two questions in the case. The first is whether the lease of the 1st January, 1840, made by the tenant for life under the power contained in the settlement, is necessarily void. That is the only question which the plaintiffs are entitled to argue, because the other is a question of fact for the jury, and they have found for the defendants. Then, is the lease void? I am of opinion that it is not. It is a lease of the coal mines and seams of coal under the estate, with full power and authority for the lessee to seek for, win, take and carry away the coal. Then two powers are given. First, to build upon the premises all such engine-houses &c., workshops, workmen's cottages &c., "erections, buildings and accommodations as shall be bonâ fide necessary or proper for or in the due prosecution and carrying on of the said works." Secondly, "to use building and other stones and slates, brick earth and ma-

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terials on the land, and make the same into bricks for building with, &c., and which shall be required for the purpose of the collieries, or for any erection or building thereby authorized to be made in or about the exercise and enjoyment of any liberty, power or authority thereby granted." If either of those two powers are inconsistent with the power given by the settlement, it may be that the lease is void, though I am far from saying that such is the case. There is a demise of the coal mine, which is clearly good; then there is a power to build workmen's cottages bonâ fide necessary or proper for the due prosecution and carrying on of the works. Now let us look at the authority given to the tenant for life. It is to lease the collieries, "together with all such powers, authorities, accommodations, liberties and privileges as shall be necessary or are usually contained in leases of collieries or mines" in that neighbourhood. It seems to me that the way to determine whether the erection of cottages is justifiable, is to inquire whether the accommodation of houses for the workmen employed in getting the coal is such a provision as is usually contained in leases of collieries in that neighbourhood. It is by comparison with leases of collieries in the neighbourhood that it is to be ascertained whether cottages may be erected. Putting on these two instruments the common and ordinary construction, it is a question of fact whether the lease was authorized by the settlement. It is said that the power is confined to such buildings as are necessary in the winning of the coal; but that, in my opinion, is not the true construction. The lessor had a right to provide for such accommodation, in the building of cottages and the taking of materials for that purpose, as is usually contained in leases in the neighbourhood. Indeed it might be that he could not procure a tenant to accept a lease without, because the mine might be in a place far

from any human abode.—With respect to the other question, it is not open to the plaintiffs, because their contest is that it was wrong to leave any question at all to the jury. However, my brother *Bramwell* left to them everything that was necessary, and they found for the defendants.

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BRAMWELL, B.—The Lord Chief Baron and my brother *Martin* being of opinion that the rule ought to be discharged, it is immaterial in one sense of what opinion I am. I confess, however, that with respect to the first point I entertain great doubt, and therefore express no opinion one way or the other. The question depends on whether the power is controuled by the words “necessary for seeking, winning, &c. the coal.” If the argument for the plaintiffs is wrong, then the question arises whether the power to build workmen’s cottages is necessary or usual in leases of collieries, and the jury have found that it is both necessary and usual. Then there is a further question whether the cottages may be built on any part of the land, without being confined to any particular spot, or whether the building must be limited in the way found by the jury. Upon that point I have not made up my mind. With respect to the point that the lessee is not made dispunishable for waste, that depends entirely on whether it is usual or necessary to build workmen’s cottages.

Rule discharged.



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The defendants, merchants at Bristol, through a broker, contracted to buy of the plaintiffs, merchants at Rotterdam, ten tons of the best refined rape oil, to be shipped "free on board" at Rotterdam in September 1857, at 48*l.* 15*s.* per ton, to be paid for, on delivery to the defendants of the bills of lading, by bill of exchange to be accepted by the defendants payable three months after date, and to be dated on the day of shipment of the oil. On the 8th of September the plaintiffs (having on the previous day advised that the shipment

would be made) shipped on board a general ship, trading between Rotterdam and Bristol, five tons of the oil, and the master signed a bill of lading by which the oil was deliverable "unto shipper's order;" and the plaintiffs indorsed it specially to the defendants. On the same day the plaintiffs inclosed in a letter to the broker the bill of lading, invoice and a bill of exchange drawn on the defendants in accordance with the contract. On the night of the 9th the ship with the oil on board was run down in the Bristol Channel and the oil totally lost. The plaintiffs' letter of the 8th arrived at Bristol on the afternoon of the 10th in due course of post, but after business hours. On the morning of the 11th the broker left with the defendants the bill of lading, invoice and bill of exchange for their acceptance. At that time he knew of the loss of the ship. In about two hours afterwards the defendants returned to the broker the documents left with them, on the ground that, under the circumstances, they were not liable to pay for the oil. In an action for not accepting the bill of exchange, and for goods sold and delivered:—*Held*, that the property in the oil vested in the defendants on its delivery on board the ship, and consequently the plaintiffs were entitled to recover on both counts: *Per Pollock, C. B., Martin, B., and Channell, B.*—*Bramwell, B., dissentiente.*

**DECLARATION.**—That defendants agreed with the plaintiffs to buy of them a certain quantity, to wit ten tons, of the best refined rape oil, to be shipped free on board at Rotterdam in September 1857, at 48*l.* 15*s.* per ton; to be paid for, on delivery to the defendants of the bills of lading, by bill of exchange to be accepted by the defendants payable three months after date, and to be dated on the day of shipment of the said oil. And although, within the month of September 1857, the plaintiffs shipped at Rotterdam a certain portion, to wit five tons, of the best refined rape oil free on board a certain ship called the "Sophie," and the residue thereof free on board a certain other ship, and delivered to the defendants the respective bills of lading of the said oil duly indorsed to the defendants; and although the plaintiffs performed all conditions precedent, and all things had been done and happened, and all time had elapsed, to entitle the plaintiffs to have the said oil paid for by bill of exchange as aforesaid, and to maintain this action: Yet the defendants made default in paying for the said portion of the said oil so shipped on board the said ship called the "Sophie," and in accepting a bill of exchange

for the same.—There was also a count for goods bargained and sold, and goods sold and delivered.

Pleas to first count.—First: that defendants did not agree with plaintiffs as alleged. Secondly: that the plaintiffs did not ship the said portion of the oil on board the ship called the “Sophie.” Thirdly: that the plaintiffs did not deliver to the defendants the bill of lading of the said portion of oil shipped on board the “Sophie” duly indorsed to the defendants. Fourthly: that the plaintiffs were not ready and willing to deliver the said portion of oil shipped on board the “Sophie,” or the bill of lading of the same oil, to the defendants in accordance with the terms of the said agreement. Fifthly: that the said agreement was for the sale of ten tons of oil generally, and not of any specific or ascertained oil. That the said ship called the “Sophie” was a general ship, and was not a ship chartered by the defendants or in any way appointed or denoted by them. That the plaintiffs, when they shipped the said portion of oil on board the “Sophie,” took from the master of that vessel a bill of lading of the said oil making it deliverable to the order of the plaintiffs or their assigns, and not otherwise. That before any delivery of the said oil to the defendants, and before any indorsement or delivery of the said bill of lading, or of any bill of lading, of the said oil to the defendants, the said ship called the “Sophie,” with the said oil on board, was totally lost, and the said oil then became and was without any neglect or default of the defendants wholly lost and destroyed. That the plaintiffs never in fact delivered or offered to deliver, nor have they been ready and willing to deliver, the said oil to the defendants; nor have the plaintiffs ever delivered or offered to deliver or been ready and willing to deliver the said bill of lading or any bill of lading of the said oil to the defendants until after the said oil had been so wholly lost and destroyed as

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aforesaid. That when the plaintiffs delivered to the defendants the said bill of lading of the said oil as in the first count mentioned, the plaintiffs knew, and the defendants did not know, that the said ship and the said oil had been so lost and destroyed as aforesaid. That the defendants have not derived any benefit or advantage whatever or any possibility of benefit or advantage under the said agreement, or received any consideration or value whatever for the liability sought to be imposed on them in this action by the plaintiffs.—To second count: never indebted.—Issues thereon.

At the trial before *Martin*, B., at the London sittings after Hilary Term, the following facts appeared.—The plaintiffs were merchants at Rotterdam, and the defendants merchants at Bristol. On the 9th of April, 1857, the defendants wrote the following letter to one Goolden, a broker at Bristol, who had before negotiated purchases between the plaintiffs and the defendants:—"Messrs. Browne & Co. may send us 20 tons of best refined rape oil in September or October next, at or under 47*s.*, free on board."—Goolden accordingly communicated with the plaintiffs, and the defendants afterwards wrote to them that they might go as high as 48*s.* On the 14th the defendants wrote to the plaintiffs about the purchase of some black lead, and stated that they had rather that the plaintiffs would communicate with them, but that all their transactions in oil might go on through Goolden. After some further correspondence between the parties, a contract was made, through Goolden, for the sale by the plaintiffs to the defendants of twenty tons of the best refined rape oil, ten tons "to be shipped free on board at Rotterdam in September 1857, at 48*l.* 15*s.* per ton, to be paid for, on delivery to the defendants of the bills of lading, by bill of exchange to be accepted, by the defendants payable three months after date, and to be dated on

the day of shipment of the oil :” the ten other tons were to be shipped in October on the same terms. On the 3rd September the defendants requested the plaintiffs to send part of the oil by the first vessel from Rotterdam, which was the “Sophie.” On the 7th September the plaintiffs wrote to Goolden, who informed the defendants on the 9th, that five tons of the oil would be shipped on the following day. On the 8th September the plaintiffs shipped on board the “Sophie,” which was a general vessel trading from Rotterdam to Bristol, five tons of the oil, and the master signed the following bill of lading :—

“Shipped in good order and well conditioned by Thos. Browne and Son in and upon the good steam ship called ‘The Sophie,’ whereof is master, &c., and now lying in this port and bound for Bristol, thirteen casks of oil, marked and numbered as in the margin, and to be delivered in the like good order and well conditioned at the aforesaid port of Bristol (the act of God, the Queen’s enemies, fire, machinery, boilers, steam, and all and every other dangers and accidents of the seas, rivers, and steam navigation of what nature or kind soever excepted), unto shippers’ order or their assigns, he or they paying freight for the said goods 25s. st. per ton, Gr. W., with 10s. primage and average accustomed and disbursements as in the margin. In witness,” &c.

On the same day the plaintiffs indorsed the bill of lading as follows :—

“Deliver the contents to the order of Messrs. Jno. Hare & Co.

“THOS. BROWNE & SON.”

The plaintiffs also made out an invoice as follows :—

“Invoice of oil shipped on board ‘The Sophie,’ J. Van Knapon, for Bristol, by order of Mr. S. Goolden for account

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of Messrs. Jno. Hare & Co. there, 13 casks rehd. Rape Oil weighing nett 12235 in England, @ £48. 15s. per ton.

“(fo. B.) £266. 5s. 6d.

“Rotterdam, 8th Sept. 1857.

“THOS. BROWNE & SON.”

(Then followed a note of weights.)

On the same day the plaintiffs inclosed in a letter to Goolden the bill of lading, invoice and a bill of exchange drawn on the defendants in accordance with the contract. On the night of the 9th the “Sophie” was run down in the Bristol Channel and the oil totally lost. The plaintiffs’ letter of the 8th arrived at Bristol on the afternoon of the 10th, in due course of post but after business hours. On the morning of the 11th, Goolden left with the defendants the bill of lading, invoice and bill of exchange for their acceptance. At that time he knew of the loss of the “Sophie.” In about two hours the defendants returned to Goolden the documents which he left with them, on the ground that, under the circumstances, they were not liable to pay for the oil. The other five tons arrived on the 28th September, and were accepted and paid for by the defendants.

The learned Judge was of opinion that under these circumstances the plaintiffs were entitled to recover; and the jury found a verdict for them, stating that in their opinion, according to mercantile usage, the risk of the loss of the oil was on the defendants. Leave was then reserved to the defendants to move to enter the verdict for them.

*Hugh Hill*, in last Easter Term, obtained a rule nisi accordingly, against which

*Butt* and *Prideaux* shewed cause in the same Term (May 6, 8).—The plaintiffs are entitled to recover both on

the special contract and on the count for goods sold and delivered. The delivery was completed on the shipment of the oil and special indorsement of the bill of lading to the defendants. Where goods are sold to be delivered "free on board," it is part of the seller's duty to ship them, but the buyer, at whose risk they are from the time of shipment, is considered to be the shipper: *Cowas-Jee v. Thompson* (a). Goolden was the agent of both parties for the purpose of receiving and transmitting the documents. The plaintiffs, by letter of the 7th September, informed the defendants that the shipment would be made; and if the defendants intended to repudiate the cargo, on the ground that it was not delivered "free on board," they should have so stated in answer to the plaintiffs' letter, and not have waited until the bill of exchange was presented to them: *Richardson v. Dunn* (b), *Alexander v. Gardner* (c). Under the circumstances, the property in the oil vested absolutely in the defendants. The plaintiffs never intended to preserve their right to it until the bill of exchange was accepted; for if so, they would have transmitted to their agent the bills of lading indorsed in blank, to be delivered over only in case the acceptance took place: *Key v. Cotesworth* (d). This case is distinguishable from *Wait v. Baker* (e), for there the vendor, to whose order the cargo was deliverable, never indorsed the bill of lading, and there was nothing which amounted to an appropriation, so as to pass the property to the vendees. Here there was a special indorsement to the defendants, with the intention to vest the property in them. In the case of a blank indorsement, there must be a delivery to the party *as indorsee*, in order to constitute an indorsement to him: *Adams v.*

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(a) 5 Moore P. C. 165.

(d) 7 Exch. 595.

(b) 2 Q. B. 218.

(e) 2 Exch. 1.

(c) 1 Bing. N. C. 671.

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*Jones (a)*; but a special indorsement operates to pass the property to the indorsee. It is not necessary, however, to rest the case on the bill of lading, for that is a mere element by which to ascertain the intention of the parties. The delivery on board the ship, for the defendants, of goods corresponding with the order, vested the property in them: *Richardson v. Dunn (b)*. In *Mitchel v. Ede (c)* the goods were delivered on board a ship which, though it in fact belonged to the defendant, differed in no respect from a general ship; the owner of the goods indorsed the bill of lading to the defendant subject to a condition, and there was nothing to shew an intention to consign the specific property to him. Here the plaintiffs clearly intended the oil for the defendants. *Ogle v. Atkinson (d)* shews that an unqualified delivery will vest the property in the consignee, irrespective of the bill of lading.

*Hugh Hill* and *Raymond*, in support of the rule.—The only difference between a special and a blank indorsement is that in the former case the person is indicated to whom the goods are to be delivered: in neither case is the property transferred until delivery of the bill of lading. Where A. specially indorsed certain bills to B., sealed them up in a parcel, and left them in charge with his own servant to be given up to the postman, it was held that the special indorsement did not transfer the property in the bills till delivery, and that delivery to the servant was not sufficient; though it would have been otherwise had the delivery been made to the postman: *Byles on Bills*, p. 129, 7th ed. The delivery on board the ship did not transfer the property to the defendants, for by the bill of lading the plaintiffs reserved to themselves a controul over the goods:

(a) 12 A. & E. 455, 459.

(b) 2 Q. B. 218.

(c) 11 A. & E. 888.

(d) 5 Taunt. 759.

*Turner v. The Trustees of the Liverpool Docks* (a). There *Patteson*, J., in delivering the judgment of the Court, explains the decision in *Ogle v. Atkinson* (b). Here the subject-matter of the contract was unascertained goods of a particular kind, viz. ten tons of the best refined rape oil, and the plaintiffs were at liberty to deliver any ten tons of oil which answered that description. But they could only fulfil their contract, so as to entitle them to the defendants' acceptance of the bills of exchange, by delivering the oil "free on board." Instead of doing so, they get the master to sign bills of lading making the oil deliverable to their order. Shipment *simpliciter* is a neutral act, and may be for the benefit of the vendors or the vendees, but the vendors having chosen to place the master under a binding contract to carry for them, how can it be said that it was a contract to carry for the vendees? The documents must be looked at as the indicia of title. The delivery of the oil and acceptance of the bill of exchange were to be contemporaneous acts, and if the defendants had refused to accept the bill after obtaining possession of the oil, the plaintiffs might have maintained trover for it: *Godts v. Rose* (c). If the plaintiffs had delivered the bill of lading to Goolden for the purpose of transferring the property to the defendants, and had afterwards revoked his authority, in an action by the defendants for the refusal to deliver they could not have said, "You took the bill of lading in your own name, but you intended it for us." In *Cowas-Jee v. Thompson* (d) the bill of lading made the goods deliverable to the consignee, and the delivery was complete when the goods were shipped on board the vessel. But where goods are deliverable to the shipper's order, though he specially indorses the bill of lading he may at any time

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(a) 6 Exch. 543.

(c) 17 C. B. 229.

(b) 5 Taunt. 759.

(d) 5 Moore P. C. 163.

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before it is delivered to the vendee alter the destination of the goods. The fact of making this bill of lading deliverable to the shipper's order is conclusive to shew his intention to preserve his right of property in the goods: *Wait v. Baker* (a), *Van Casteel v. Booker* (b), *Ellershaw v. Magniac* (c). In *Richardson v. Dunn* (d) there was no shipment under a bill of lading. In *Alexander v. Gardner* (e) the principal objection was that the property in the goods did not pass to the vendee because they were not in the possession of the vendors at the time of the contract. In *Key v. Cotesworth* (f) the bill of lading made the goods deliverable to the vendees. Here the contract would remain incomplete until the delivery of the bill of lading to the defendants; and when it was tendered to them it was mere waste paper, for at that time the goods were lost.

*Cur. adv. vult.*

The learned Judges having differed in opinion, the following judgments were delivered.

BRAMWELL, B.—I am of opinion that this rule should be made absolute. I will first consider the actual case independent of the pleadings. The plaintiffs agreed to sell to the defendants, and the defendants agreed to buy of the plaintiffs, a quantity of oil, the particular parcel not being ascertained. In addition to selling, the plaintiffs were to ship the oil free on board a vessel to take it from the plaintiffs to the defendants. The defendants were to pay on delivery of the bills of lading, by bills to be dated on the day of shipment of the oil. Oil was shipped by the plaintiffs to the extent of about 20 tons. Various bills of

(a) 2 Exch. 1.

(b) 2 Exch. 691.

(c) 6 Exch. 570, n.

(d) 2 Q. B. 218.

(e) 1 Bing. N. C. 671.

(f) 7 Exch. 595.

lading in sets were signed: they were taken deliverable to the plaintiffs' order. One of a set, for about five tons, was indorsed by them specially to the defendants (i. e. such an indorsement was written on it) and tendered to the defendants, but before the tender the ship and oil were lost and destroyed. The plaintiffs, however, on the 7th September, wrote to Goolden to inform the defendants, which he did before the loss of the *Sophie*, that she would bring 5 tons of refined rape oil for the defendants; but they did not identify or appropriate any particular oil, nor even intimate that it had been shipped,—probably it had not been, as the bill of exchange is dated the 8th. This contract is essentially a contract for the supply of unascertained chattels, and I think it is clear law that, under such a contract, the seller can have no right of action till the seller has done an act which, by the agreement between him and the buyer, is to vest the property in the buyer: as, by delivery to him, or to a carrier *for him*, of goods corresponding with the writing, or till the seller has appropriated or offered to appropriate and supply to the buyer certain chattels which correspond with the contract: see Blackburn on the Contract of Sale, pt. 2., c. 1. Have either of these things taken place here? I think not. An appropriation in the seller's own mind, a mere intent to appropriate,—a matter which the seller can suppress or undo at pleasure,—will not suffice. If he offers to appropriate particular articles, and the buyer without cause refuses them, a right of action for not accepting vests; but unless there is an appropriation offered, and accepted or refused, there is no cause of action. I do not understand there is any doubt on the law: then it remains to examine the facts. I think it immaterial, but the "*Sophie*" was selected by the plaintiffs, not by the defendants. If she had been the defendants' ship, and the oil had been put on board it, as it might have been deli-

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vered to a waggon, that would have been a delivery to the defendants, assuming the oil corresponded with the contract. So, the "Sophie" being as it were a carrier's ship, the oil might have been put on board, as a parcel to be carried by land may be given to a common carrier, so as to vest the property in the consignee and be a delivery or not according to the right of lien. So if, after the shipment, bills of lading had been taken in the defendants' name, or if taken in the plaintiffs' name they had been indorsed and delivered to the defendants while the goods were in existence, I think that would have been a compliance with the contract; because, even assuming the property is to be in the buyer from the time of shipment, and that the seller is the buyer's agent to ship, still I think he may exercise that agency in his own name, and that it is no more necessary he should take the bill of lading in the buyer's name, than it is that he should say at the moment of shipment, "These are the buyer's goods, I ship on his account." In such a case his tender of the bill of lading, properly indorsed to the buyer, may well be taken to shew he was acting as the buyer's agent in the shipment, and consequently that he, in effect, shipped the goods for him. But if the seller had the right, as long as the goods were in existence, to say that he had done nothing to vest the property in the buyer, that he never offered to appropriate them, surely it was too late for him to do so after the goods were lost. Then, had he done anything to vest the property, had he delivered, had he offered to appropriate this oil while it was in existence? If so, when? At the moment of shipment? Clearly not. How could it be? The ship was not the defendants', the oil was put on board with no notice that it was for the defendants, other oil was put with it, and it was in the power of the plaintiffs to appropriate to the defendants such part, or no part, of the whole, as

they pleased. The cases referred to below clearly shew there was no delivery. Was it, then, when the plaintiffs took the bill of lading? Clearly not. When they indorsed it? I say, as clearly not, for there was nothing to prevent their erasing that indorsement, or destroying or suppressing that bill of lading, and indorsing another. Then, was the property so vested or appropriated by the bill of lading so indorsed being sent to Goolden? That depends on whether Goolden was, in any way, the agent of the defendants, and otherwise the case is as though the sellers had themselves brought the bill of lading to Bristol: they retained their power over it as long as their agent held it. Then I am of opinion Goolden was in no way defendants' agent. It is said the sellers intended this oil for the defendants. I doubt it not; but intention is immaterial till it manifests itself in an act. If a man intends to buy, and says so to the intended seller, and he intends to sell, and says so to the intended buyer, there is a contract of sale; and so there would be if neither had the intention. If there is a contract of sale, and the seller intends to appropriate a particular chattel in fulfilment of it, and the buyer intends to accept, and accepts, the property vests in him; and so it would had there been no such intention. If the buyer refuses, and the chattel corresponds with the contract, the vendor has a right of action, not because of his intention, but of his offer. An intention not communicated to the buyer is immaterial. Telling it to an indifferent person is no more than though he had noted it in his memorandum book, which is no more than though it existed solely in his own mind.

If the case is tried by the pleadings, I come to the same conclusion. Either the shipment was to be for the defendants at the time of shipment, or it was to be appropriated to them afterwards. In the former case the declaration must

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be taken to allege such a shipment, and the second plea is an answer. On the latter view, the delivery of the bill of lading must be taken to be a delivery while the oil was capable of appropriation, and then the fourth plea meets the case. Any how the fifth plea is proved, for the allegation that the plaintiffs knew the oil was lost and the defendants did not, is immaterial—of course if that plea is bad, it is not proved, as those allegations are not.

This opinion is warranted by the authorities. If no property vested in the defendants while the goods were in esse, it remained in the plaintiffs, and they must bear the loss. The following authorities shew that no property did vest: *Turner v. The Liverpool Docks* (a), *Ellershaw v. Magniac* (b), where there is the expression in the judgment, "though the goods might have been purchased with the intention they should be delivered to Ellershaw, that intention was never executed;" *Mitchell v. Ede* (c), *Van Casteel v. Booker* (d); no doubt in some of those cases the word "intention" is used, but it means "intention indicated." In the judgment in *Turner v. The Liverpool Docks* it is said:—"The question really is whether any and what effect is to be given to the terms of the bill of lading, for if by those terms they reserved to themselves the dominion over the cotton it would not pass to the assignees." And in this case it was well argued by Mr. *Raymond*, that had the position of the parties been reversed the defendants could not successfully have said, "you took the bill of lading in your own name, but you intended it for us." But *Wait v. Baker* (e) seems to me in point, and the reasoning of Baron *Parke* decisive. Nay, it is stronger than the present case, for there it is manifest Lethbridge had intended the barley for the de-

(a) 6 Exch. 543.

(d) 2 Exch. 691.

(b) 6 Exch. 570, n.

(e) 2 Exch. 1.

(c) 11 A. &amp; E. 888.

fendant and had told him so; but having done an act which retained the property in himself, and there being no unqualified tender, it was held not to pass to the vendees. In conclusion I say there was no delivery of the goods, because the only thing that could be called a delivery was the shipment, and that was none; for the same reason there was no bargain and sale, which supposes the goods are ascertained; and there was, for the same reason, no offer to supply by delivery on board, and no offer subsequent.

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POLLOCK, C. B.—I have to deliver the judgment of my brother *Martin*, my brother *Channell* and myself.

The declaration contained several counts. The first stated that the defendants agreed with the plaintiffs to buy of them ten tons of best refined rape oil; to be shipped free on board at Rotterdam in September 1857, at 48*l* 15*s*. per ton; to be paid for on delivery to defendants of the bill of lading, by bill to be accepted by defendants at *three months after date*, to be dated on the day of shipment of the oil. The count contained the necessary averments of performance, and stated as a breach the non-acceptance of the bill.

There were counts for goods bargained and sold and goods sold and delivered. The pleas denied liability, and there was a special plea which raised the same defence.

At the trial at Guildhall before my brother *Martin*, the facts proved were these:—The plaintiffs were merchants at Rotterdam and the defendants merchants at Bristol, and through Mr. Goolden, a broker at Bristol, they had made the contract of sale in the terms stated in the first count. On the 8th September, the plaintiffs (having on the previous day advised that the shipment would be made) shipped on board a steamer (a general ship), trading between Rotterdam and Bristol, five tons, parcel of the ten tons agreed

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to be sold by the contract, and received a bill of lading made out deliverable "To the shipper's order." On the same day they indorsed it *specialy* to the *defendants*, and enclosed it and an invoice and a bill of exchange drawn in accordance with the contract to Mr. Goolden, to be delivered to the defendants and their acceptance to the bill obtained. The letter arrived at Bristol on the afternoon of the 10th, in due course of post, but after business hours. On the morning of the 11th Mr. Goolden took all the documents, viz., the bill of lading, the invoice and the bill of exchange, and delivered them to one of the defendants. He then knew, and the fact was, that on the night of the 9th *the steamer in which the oil was, was run down in the Bristol Channel and the oil totally lost.* In about two hours the defendants returned the documents, and insisted that under the circumstances they were not bound to accept the bill or pay for the oil. The action was brought upon the 12th December, and the jury found a verdict for the plaintiffs, and stated that in their opinion, according to mercantile usage, the risk of the loss of the oil was upon the defendants. My brother *Martin* gave leave to move to enter a verdict for them. A rule was obtained for this purpose, and it has been argued. The objection made on their behalf was that the oil was not delivered "free on board" within the true meaning of the contract, because the bill of lading was made out deliverable to "the shipper's order," and that therefore the plaintiffs had the controul over the oil, and the contract for the carriage with the master and owner of the steamer was made with them. Several cases were cited on behalf of the defendants, *Wait v. Baker*, *Turner v. Liverpool Docks Trustees*, *Van Casteel v. Booker* and some others.

We think they are all clearly distinguishable. If, at the time the oil was shipped at Rotterdam, the plaintiffs had intended to continue their ownership, and had taken the bill

of lading in the terms in which it was made for the purpose of continuing the ownership and exercising dominion over the oil, they would in our opinion have broken their contract to ship the oil "free on board," and the property would not have passed to the defendants; but if when they shipped the oil they intended to perform their contract and deliver it "free on board" for the defendants, we think they did perform it, and the property in the oil passed from them to the defendants. If, when the bill of lading was made out, they of purpose and design had the oil made deliverable to "shipper's order" for an advantage and benefit to themselves, it would be a different case; but if they had no object in the matter,—and they clearly had none, for upon the same day they indorsed it specially to the defendants, and transmitted it to Bristol,—we think it is exactly the same thing as if the bill of lading had originally been made out deliverable to the defendants.

It was said that so long as the bill of lading was in the hands of the plaintiffs or of their agent Mr. Goolden, they had the controul over the oil, and no doubt they had to a certain extent, but they would have had precisely the same controul whether the bill of lading was made out deliverable to the defendants or to the plaintiffs' order, and indorsed by them to the defendants. It is clear that it was intended by the contract that the plaintiffs should have this controul, for the delivery of the bill of lading to and the acceptance by the defendants of the bill of exchange were to be cotemporaneous acts, and the plaintiffs or their agent were not bound to deliver the bill of lading until they received the acceptance.

In all the cases cited on behalf of the defendants the bills of lading were designedly and of purpose made out to shipper's order to prevent the property passing, and enable the vendor to retain the possession and controul of the goods.

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This distinguishes them from the present case. As to the contract in the bill of lading being originally made with the plaintiffs, we do not think it at all affects the terms as to the shipment "free on board," and especially since the statute 18 & 19 Vict. c. 111, which transfers the contract of the bill of lading to the indorsees.

In our opinion therefore the law coincides with the view taken by the jury, and the plaintiffs are entitled to recover upon the special count. We also think they are entitled to recover upon the count for goods sold and delivered, for upon the delivery on board the general ship, we consider the property vested in the defendants, and that therefore this count is maintainable.

It was said that the defendants could not insure the oil. This is not so in fact, for by a letter of the 7th, which was communicated to them on the 9th, they were informed that the shipment would take place on the following day; but whether they had the opportunity to insure or not is immaterial to the present question, which depends upon the law as to contracts and the transfer of property to a vendee upon a sale.

June 8 & 10.

HATTON and COOKSON v. ROYLE.

A and B., partners, dissolved the partnership upon the terms that all debts due to and owing by the firm should be received and

paid by A. A. employed C., an attorney, in winding-up the affairs. A. having brought an action against D., in the names of himself and B., for a debt alleged to be due to the firm, and a plea of set off having been pleaded, *all matters in difference between A. and B. and D.* were, by a Judge's order and by the consent of the attorneys employed in the cause, referred to the award of M. C. acted solely under A.'s instructions, without any express authority from B. In an action brought on the award:—*Held*, that the submission was not binding on B.

that on the 11th of August, 1856, by an order of Mr. Justice *Crowder*, it was ordered, with the consent of the attornies on both sides, that all matters in difference between the said parties should be referred to the award of J. M. upon certain terms, the costs of the reference to be in the discretion of the arbitrator: that J. M. took upon himself the burden of the arbitration and made his award concerning the matters in difference, and thereby awarded, found and determined the said action in favour of the now plaintiffs; and as to all matters in difference between the said parties, he found and awarded that Robertson and the defendant were indebted to the plaintiffs in the sum of 87*l.* 7*s.* 3*d.*, and directed that Robertson and the defendant should pay the said sum of 87*l.* 7*s.* 3*d.* to the plaintiffs; and that Robertson and the defendant should pay their own costs of the reference, and the now plaintiffs' costs of the reference and the costs of the award: that the costs of the now plaintiffs of the reference were duly taxed at 40*l.* 1*s.*, and although all conditions precedent had been performed, and everything had happened, and all times had elapsed necessary to entitle the now plaintiffs to have the award performed, yet Robertson and the defendant had not paid the said sums or either of them.

Pleas.—First, that the defendant did not commence or join in the action, nor was the order made in any action brought by the defendant and Robertson. Secondly, that the order was not made with the consent of the defendant or any attorney of the defendant, or any person authorized by the defendant to assent to the same or any such order as alleged. Thirdly, that that action in the declaration mentioned was commenced and carried on in the names of Robertson and the defendant, and the said order was made without the knowledge, privity, authority or consent of the defendant; and the defendant never assented to or sanc-

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tioned the said order, nor has the defendant in any way submitted or joined in submitting the matters in difference in that count mentioned to the award, arbitrament of determination of J. M.; nor has he ever consented or agreed to be bound thereby.—Upon these pleas issue was joined.

The cause came on to be tried before *Watson*, B., at the Liverpool Summer Assizes 1857, when a verdict was taken for the plaintiff, subject to the opinion of the Court upon a case, which was in substance as follows:—

The defendant carried on business in partnership with one Robertson as shipwrights, under the firm of Robertson and Royle, from the year 1847 until the 5th of December 1850, when, by a notice in the *Gazette*, the firm dissolved partnership by mutual consent, upon the terms that all debts due to and owing by the firm should be received and paid by Robertson. Messrs. Anderson and Collins acted as the attornies for Robertson in winding up the affairs of Robertson and Royle. In the course of such winding-up, an action was brought against the present plaintiffs at the suit of Robertson and Royle. The writ, indorsed with a claim of 411*l.* 4*s.* 11*d.* for debt, and bearing date the 19th of May, was served on the 17th of July, 1851. Messrs. Anderson and Collins, in answer to an inquiry respecting the bringing of this action, informed Messrs. Shackleton, the attornies of Royle, by letter, dated the 26th of May, 1851, that “the proceedings against Messrs. Hatton were caused by their refusal to reply to any communications, as they disputed the account.” Mr. Booker, the attorney for the present plaintiffs, appeared to the writ, and a declaration and particulars were delivered, claiming 584*l.* 15*s.* 1*d.* as a balance due to the firm of Robertson and Royle.

The defendants pleaded never indebted, payment, and set off; and the cause eventually stood for trial at Liverpool

in August 1856. Before it was called on Messrs. Anderson and Collins, as attornies for the plaintiffs in that action, and Mr. Booker for Messrs. Hatton and Cookson, signed a consent to an order of reference of the cause and all matters in difference between the parties to an arbitrator, the costs of the cause to abide the event of the award; all other costs, including costs of reference, to be in the discretion of the arbitrator. The arbitrator to be at liberty to take cognizance of all facts, matters and things in difference between the parties and which were within his own knowledge; and upon all other usual terms. A Judge's order was drawn up embodying these terms.

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The arbitrator awarded that the plaintiffs, in the action of *Robertson and Royle v. Hatton and Cookson*, should pay to the defendants the sum of 87*l.* 7*s.* 3*d.* for debt and the costs of the reference and award. The order of reference was made a rule of Court, and the costs were duly taxed at 40*l.* 1*s.* In such taxation, as well as in bringing the action, Anderson and Collins acted only under Robertson's directions without any authority from Royle, except such as might be inferred from the facts stated in the case. The award and allocatur were duly served, and the sum of 127*l.* 8*s.* 3*d.* demanded of the defendant Royle by Cookson, one of the plaintiffs.

The question for the opinion of the Court is whether, under the circumstances above stated, the defendant, Royle, is liable upon the award for the sum of 127*l.* 8*s.* 3*d.* or any part thereof. If the Court shall be of opinion that he is so liable, a verdict is to be entered for the plaintiffs for 127*l.* 8*s.* 3*d.*, or such other sum as the Court shall direct; if he is not so liable a nonsuit shall be entered.—The Court to be at liberty to draw any inferences of fact.

*Brett* argued for the plaintiffs.—The defendant Royle



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having been in partnership with Robertson the partnership was dissolved upon the terms that Robertson should have power to collect the debts. That must imply a power to take all necessary and reasonable steps for that purpose. Here it does not appear that there was any matter in difference other than the matters in the action and the set-off. [*Bramwell*, B.—You are bound to shew that the submission is binding. *Martin*, B.—What authority was there from Royle to refer not only the action but all matters in difference?] The Judge's order of reference was made in a cause to which Royle was a party, with the consent of the attorney who was regularly acting for Royle as well as Robertson. *Primâ facie* therefore Royle is bound by the act of the attorney, and is liable on the award. The Court will not allow the party under such circumstances to disavow the act of his attorney, though he has exceeded his authority: *Filmer v. Delber* (a), *Elworthy v. Bird* (b). It appears that the defendant knew of the bringing of the action in his name, and did not interfere to prevent it. [*Watson*, B.—He could not have interfered effectually to prevent it. The Court of Chancery, or this Court, would have compelled him to allow the use of his name as plaintiff; but they would not have compelled him to consent to a reference.] The Court are to draw inferences of fact, and, under all the circumstances, will infer that the defendant was a consenting party to the arbitration.

*Rew*, contra, was not called upon to argue.

MARTIN, B.—We are all of opinion that the defendant is entitled to our judgment. I do not say that there is not a scintilla of evidence of his assent to the reference, but not enough to warrant us in holding him liable.

(a) 3 Taunt. 486.

(b) Tamlyn, 38, 43.

**WATSON, B.**—The reference of all matters in difference is a reference of separate, as well as of joint actions. Robertson's authority could not extend beyond matters relating to the partnership affairs.

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**BRAMWELL, B.**—The plaintiffs should have brought their action against Messrs. Anderson and Collins for referring without authority to do so. In the present action the plaintiffs must be nonsuited.

**POLLOCK, C. B.**, concurred.

Judgment of nonsuit.

**PALMER v. ROUSE and Others.**

June 10.

**T**HE declaration stated that the defendants by their bond became bound to the plaintiff in 400*l.*, subject to a condition that if all such sums as should be found legally due on account of salvage and expenses and costs, in respect of services rendered by J. E. Baker and others, in salving 89 balks of timber and 15 battens at sea in Yarmouth Roads, and in getting the same to the shore or otherwise in securing the same on Yarmouth Beach, on the 30th of October, 1856, should be duly paid, the said bond was to become void; otherwise to remain in force.—Averments: that after the making of the bond a large sum of money, to wit the sum of 49*l.* 10*s.*, was found legally due on account of the said salvage and expenses in the said condition mentioned, according to the provisions of "The Merchant Shipping Act, 1854," by R. H. and W. J., Esqrs., then being two of her Majesty's justices of the peace in and for

Timber found floating without an apparent owner at sea, having drifted from the place where it was moored in a river, is not "wreck" within the meaning of that word as defined by "The Merchant Shipping Act, 1854," s. 2.—*Held*, therefore, that persons who had secured such timber could not enforce a claim for salvage in respect of their services under ss. 458, 460 of that Act.

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the borough of Yarmouth, in the county of Norfolk, who then were resident in or near the place where such wreck was found, and who then had jurisdiction in that behalf under and by virtue of the Act, and duly exercised such jurisdiction, of all which defendants had notice.—Breach; that although a reasonable time for payment had elapsed, the defendants had not, nor had any other person, &c., paid the said sum of 49*l.* 10*s.*, contrary to the condition of the bond, &c.

Plea.—That the timber and battens in the condition mentioned were not wreck within the meaning of “The Merchant Shipping Act, 1854;” nor had the said justices any jurisdiction, power, or authority to arbitrate or find what was legally due on account of the said salvage &c. and expenses in the said condition mentioned; nor was the sum of 49*l.* 10*s.*, or any part thereof, found to be legally due on account of the said salvage, and according to the provisions of the said Merchant Shipping Act, 1854, by the said justices or any other justices having jurisdiction according to the provisions of the said Act, or otherwise howsoever within the true intent and meaning of the said condition.

The cause being at issue, a case, in substance as follows, was stated for the opinion of the Court by consent of the parties and order of a Judge.

On the 29th of October, 1856, a raft of timber was moored at a place called Sherrington and Preston’s Quay, in the county of Suffolk, about two miles up the river from the entrance of Yarmouth Harbour. In the night the timber got loose and was carried out to sea by the ebb-tide to the place where it was taken possession of by the salvors, while floating in the sea at three miles distance from Yarmouth Harbour. They did not know that it had floated out of Yarmouth Harbour.

The salvors took possession of the raft, and afterwards

caused it to be entered with the plaintiff, as receiver of wreck for the district of Great Yarmouth, under "The Merchant Shipping Act, 1854," 17 & 18 Vict. c. 104.

The timber was afterwards demanded of the plaintiff by the defendants as the owners thereof. It is admitted that if it was not wreck within the meaning of the Act, the plaintiff had no right to detain it or to have the bond declared on executed, but that if it were so he had such right. Upon such demand being made the plaintiff refused to deliver up the same to any person, unless security were given to him under the 468th section of the statute; whereupon the defendants executed the bond declared upon. After the bond was executed the defendants were served with a notice to appear before R. H. and W. J., Esqrs., justices, &c., and attend the adjudication upon the claim for salvage. They appeared under protest, upon the ground that the timber was not wreck within the meaning of that Act. The justices proceeded to hear and award upon the matter, and awarded to the salvors the sum of 49*l.* 10*s.* for their services. The sum of 49*l.* 10*s.* was demanded of the defendants.

The Court is to be at liberty to draw any inferences of fact, and to amend the pleadings as the Court may think fit.

The question for the opinion of the Court is, whether the plaintiff is entitled to succeed on the issue raised by the plea; if the Court shall be of opinion in the affirmative, judgment shall be entered for the plaintiff; if the Court shall be of opinion in the negative, a *nolle prosequi* shall be entered, &c.

*Shee*, Serjt. (with whom was *W. R. Cole*), for the plaintiff.—The question is whether this timber was *wreck* within the meaning of that word in the Merchant Shipping Act, 1854. If so, the salvors were entitled to reasonable salvage

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by section 458. Wreck at common law means, where any ship is lost at sea and the goods or cargo are thrown upon the shore. A grant of wreck does not pass flotsam. The Act, however, gives to the word wreck a more extensive signification than it had at common law. By the Interpretation Clause, s. 2, "wreck" is to "include jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water." Flotsam is a term sufficiently large to include this timber. [*Pollock*, C. B.—In the *Termes de la Ley* it is said:—"Floatsam or flotson, is when a ship is drowned or otherwise perished and the goods float upon the sea, and they are given to the Lord Admiral by his letters patents."] In *Malyne's Lex Mercatoria*, Collection of Sea Laws, c. xxiv., it is said:—"Ships, goods or geare, or whatsoever other things found within the sea or floud thereof, are of three sorts: as either found on the stream floating, and these are called floatson," &c. Though in general, as for instance in *Com. Dig. tit. Wreck (A.)*, the word is used in respect of goods which have originally belonged to or formed part of a ship, yet it is large enough to include goods that swim without an apparent owner upon the sea; and that sense is given to the word in *Knowles' Dictionary*, *Wharton's Law Lexicon*, and *Perry's Dictionary*. The natural meaning of the word is things floating. [*Pollock*, C. B.—If the legislature uses a well known law term, it must be taken to have used it in its ordinary sense.] In the 9 & 10 Vict. c. 99, "An Act for consolidating the laws relating to wrecks and salvage" by s. 5, it is enacted that all persons finding any wreck "or any goods jetsam, flotsam, lagan or derelict, or any boat, vessel, apparel, anchor, cable, tackle, stores or materials, or any goods, merchandize or other article whatsoever, which shall have been found floating or sunk at sea or elsewhere in any tidal waters, shall deliver it to the receiver of customs," &c.

The present Act merely adopts a more compendious mode of describing the same things. [*Bramwell*, B.—Does not flotsam mean those goods which would be wreck if they came ashore?] It does, if the Court is bound by the old authorities. [*O'Malley*.—The 19th section of the 9 & 10 Vict. c. 99, which relates to the allowance of reasonable salvage, provides for such goods only as may have belonged to any ship or vessel.] In *Hale de Jure Maris*, c. 7, s. 2, flotsam is treated of as something not necessarily connected with the hull, apparel, or cargo of a ship.

*O'Malley*, for the defendant, was not called upon to argue.

POLLOCK, C. B.—We are all of opinion that our judgment must be in favour of the defendant. The action was brought in respect of the decision of two justices upon a claim for services rendered in securing timber, supposed to have been carried out to sea by the tide from above Yarmouth Harbour, in consequence of the fastening having become loose, and found floating in the sea. The question arises whether the justices had jurisdiction. I think that they had not. Flotsam, jetsam, and lagan are terms not applicable to property in such a condition. The special authority is given to justices only in cases within the Act. Therefore the present claim cannot be sustained, and a *nolle prosequi* must be entered.

MARTIN, B.—I am of the same opinion. The case depends on the construction of the Merchant Shipping Act, 1854. That Act was passed with reference to shipping, and must therefore be taken to apply to matters connected with shipping. The Act gives a jurisdiction unknown at common law, and subjects the owners of goods to the payment of charges to which at common law they were not liable.

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It must therefore be construed strictly. Now, according to the well known meaning of flotsam, as stated in the *Termes de la Ley*, it refers to goods having been at sea in a ship and separated from it by some peril. There is no authority for the interpretation sought to be put upon the word by my brother *Shee*.

BRAMWELL, B.—I entirely concur.

WATSON, B.—We must give to the words found in this Act their ordinary interpretation. Wreck, in many parts of England, belongs to the lords of manors. But in order to constitute a legal wreck the goods must come to land; if they continue at sea the law distinguishes them as jetsam, flotsam or lagan. That is the well known legal interpretation of the terms, and we need not search modern dictionaries to see how they are to be understood.

Judgment of nolle prosequi.

June 1.

COOMBS v. THE BRISTOL AND EXETER RAILWAY COMPANY.


A. agreed verbally to buy of B. all the whalebone he could procure at a certain price, to be sent by a particular railway, A. agreeing to pay the carriage. Some whalebone, to an amount exceeding 10*l.*, having been delivered at the railway station by B. consigned to A., and having been duly invoiced to him, was lost in the transit. B. then wrote requesting A. to make a claim against the Company.—*Held*, that there having been no acceptance and receipt of the goods within the 17th section of the Statute of Frauds, A., the consignee, was not entitled to sue the railway Company for the loss.

THE declaration stated that, the defendants being common carriers for hire, the plaintiff delivered to the defendants as such common carriers, and the defendants as such carriers received from the plaintiff, certain goods of the plaintiff, viz. a packet of whalebone, to be safely and securely carried from Exeter to Bristol, and there to be delivered by the defendants for the plaintiff for reward. And although a reason-

able time had elapsed before this suit: Yet the defendants made default in carrying and delivering the said goods, and also, while they had the said goods for the purpose aforesaid, so negligently and improperly carried the same, that by the default, negligence and improper conduct of the defendants in that behalf the said goods were wholly lost to the plaintiff.

Pleas (inter alia).—First: Not guilty. Secondly: That the plaintiff did not deliver to the defendants, nor did the defendants receive from him, the said goods to be carried as aforesaid.—Whereupon issue was joined.

At the trial before *Watson, B.*, at the London Sittings in Easter Term, it appeared that for some time previously to October, 1857, the plaintiff, an umbrella manufacturer and dealer in whalebone at Bristol, had agreed with one Avery to buy of him any quantity of old whalebone he could procure, at 2s. 7d. a pound; the whalebone to be delivered at the station of the Bristol and Exeter Railway Company at Exeter, addressed to the plaintiff, who was to pay the carriage. On the 19th of October, Avery delivered at the station of the Railway Company at Exeter 100 lbs. weight of whalebone, directed to the plaintiff at Bristol, and sent the invoice to the plaintiff, charging him with the price, amounting to 12l. 18s. 4d. On the 21st of October the plaintiff wrote to Avery, stating that he had not then received the whalebone, although the invoice had arrived the day before, and promising to send a draft when he should receive the whalebone. Avery inquired at the station at Exeter, and was told that the whalebone had been sent from thence. After some further correspondence, on the 30th of October Avery wrote to the plaintiff, saying, "As to the missing bone, as they have the account of it in Bristol, you had better make the claim for the amount forthwith. I shall leave it in your hands, as you can tell them the price you gave for it. I should also charge them

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for the loss and inconvenience of not receiving it. As soon as you can make it right, please to send me the amount." The whalebone was never delivered.

Upon this evidence the counsel for the defendants objected that, as the contract was for the sale of goods above the value of 10*l.*, and there was no agreement in writing, or acceptance of the goods within the Statute of Frauds, and as there was no consent to accept the particular goods sent, no property in the goods passed to the plaintiff, and therefore he was not entitled to maintain the action. The learned Judge directed a verdict to be entered for the plaintiff, reserving liberty to the defendant to move to enter a nonsuit, the Court to be at liberty to draw such inferences of fact as a jury might.

*Kinglake*, Serjt., having obtained a rule nisi accordingly,

*Butt* and *Prideaux* now shewed cause.—The case of *Coats v. Chaplin* (*a*) is an authority that where there has been a verbal order for goods above the value of 10*l.*, and no directions have been given as to sending them, if the seller send them to the buyer by a carrier, who loses them, the seller may sue. But *Patteson*, J., there said, "If the consignees had selected a particular carrier, it would have made a difference: perhaps if they had ordered that the goods should be sent by 'some carrier,' the delivery to the carrier *might* have constituted a delivery to the consignees." If goods which have been ordered are delivered to a carrier named by the purchaser, an action for goods sold may be maintained. [*Martin*, B.—That is so if there is a valid contract, but such delivery is not sufficient to take the case out of the Statute of Frauds: *Hanson v. Armitage* (*b*). *Pollock*, C. B.—Though as between the parties the contract may not be enforceable, it may be good for collateral purposes.

(*a*) 3 Q. B. 483.

(*b*) 5 B. & Ald. 557.

Cannot the act of the carrier, in receiving the goods for the buyer, be ratified and made the buyer's own act? Suppose A. orders goods, and the seller goes to A.'s agent and says, "Will you accept the goods on behalf of A.?" If the agent accepts the goods, and A. ratifies his act, the seller could not undo his own act and claim back the goods.

*Bramwell, B.*—Suppose I order goods, to be delivered to a person, who consumes them: do I not accept the goods?] *Stead v. Dawber* (a) shews that the contract is not void, though not enforceable between the parties. Delivery to a carrier, though not named by the vendee, is a delivery to the vendee: *Dutton v. Solomonson* (b); and there is no authority that where there has been a delivery to a carrier named by the vendee, the vendor is the proper person to sue in case of the loss of the goods. [*Watson, B.*—It may be contended, that if goods are sent to a particular carrier in consequence of the order of the vendee, the purchaser has a qualified possession, in respect of which he is entitled to sue whether he has a property in them or not.] The plaintiff is not seeking to enforce the contract. Setting aside the question whether the property passed, he was at least a bailee of the goods: the carrier held them as his agent. In *Coats v. Chaplin* (c) there was no evidence of an acceptance of the goods by the purchaser, while the fact that the vendor sued was evidence that he did not treat the contract as complete. Here, by bringing his action, the plaintiff shews that he assented to the appropriation of the goods. *Norman v. Phillips* (d) was a case between vendor and purchaser. That case is also distinguishable from the present, because here, beyond the mere fact of delivery to the carrier, there is evidence that the parties had elected to treat the contract as complete. If the buyer exercises any act of ownership in relation to the goods, as if he resell or attempt to resell them, that

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(a) 10 A. &amp; E. 57. See p. 65.

(b) 3 Bos. &amp; P. 582.

(c) 3 Q. B. 483.

(d) 14 M. &amp; W. 277.

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is sufficient to warrant a jury in finding a delivery and acceptance: *Blenkinsop v. Clayton* (a), *Chaplin v. Rogers* (b), *Morton v. Tibbett* (c). [*Martin*, B.—Here the purchaser could only accept by taking the goods after he had had an opportunity of inspecting them: *Hunt v. Hecht* (d). *Meredith v. Meigh* (e) is an authority to the same effect.] The goods were not unascertained goods, because the plaintiff had agreed to take “all the whalebone sent.” [*Bramwell*, B.—Suppose the plaintiff is right in his contention that he can sue, though the property was never vested in him, to what damages is he entitled?]

*Kinglake*, Serjt., and *Collier*, in support of the rule.—In the absence of a special contract, the proper person to bring the action against a carrier for the loss of goods entrusted to him to be carried is the owner of the goods. Hence the consignee is usually the proper plaintiff, because the delivery of the goods to the carrier commonly vests the property in him: *Roscoe on Evidence*, p. 411, 9th edition, citing *Dunlop v. Lambert* (f) and *Dawes v. Peck* (g). It is only where there is a special contract with the carrier that the question of ownership becomes immaterial. The question, then, is, had the property in the whalebone vested in the plaintiff? Now, from *Hanson v. Armitage* (h) and other cases collected in *Roscoe on Evidence*, p. 342, it appears that delivery to a carrier named by the purchaser is not a delivery to the purchaser, because he is not the purchaser's agent to accept the goods. In *Norman v. Phillips* (i) *Alderson*, B., points out that there can be no acceptance by the purchaser while there is a power to reject the goods. No doubt the delivery to the carrier would have been a valid

(a) 7 Taunt. 597.

(b) 1 East, 192.

(c) 15 Q. B. 428.

(d) 8 Exch. 814.

(e) 2 E. & B. 364.


(f) 6 Cl. & F. 600.

(g) 8 T. R. 330.

(h) 5 B. & Ald. 557.

(i) 14 M. & W. 277.

delivery to the vendee, if there had been a complete sale and transfer of the property by the contract. In that case the seller would have transmitted the goods as agent for the vendee.

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POLLOCK, C. B.—This is an action by the consignee against a carrier to recover the value of goods lost in the course of conveyance. The question is whether the property passed to the vendee. If it passed, the plaintiff, the vendee, is the proper person to sue; if not, the vendor should have sued. It would be very inconvenient to treat the liability of a carrier as ambulatory,—to hold that he is not liable to the consignee unless the latter does some act shewing an intention to treat the contract as valid, but that he may be made liable by the act of the consignee in bringing an action. The argument of the plaintiff's counsel would go to this extent: that the consignee, in a case where the contract is incomplete, may elect to treat it as valid, and by such adoption entitle himself to say, as against the carrier, that he is the proper person to sue. But the liability of the carrier cannot be altered by anything which takes place after the loss: it must be certain at the moment of the loss. Therefore the question is, whether the delivery to the carrier was a delivery to the vendee. I suggested, in the course of the argument, that the only way in which the plaintiff could make out that the action was well brought by him, as consignee, would have been to shew that he had adopted something done by the carrier, as his agent, adoption being equivalent to a prior demand. But I am not sure that a prior demand would have done. It was suggested in *Coats v. Chaplin* (a) that the consignee might have sued. That

(a) 3 Q. B. 483.

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was answered by the opinions of the majority of the Judges that it was necessary that the property in the goods should have passed to enable him to do so. There is a decision in this Court (a) that delivery to a carrier is not sufficient, and that, in order to satisfy the Statute of Frauds, the consignee must have had the power to reject the goods. *Alderson*, B., points out that the statute requires that the vendee should have received the goods. Here, as there was no acceptance of the goods by the vendee, and nothing else to take the case out of the statute, the property did not pass to the plaintiff; and on that ground the rule must be absolute to enter a nonsuit.

MARTIN, B.—I am of the same opinion. The plaintiff, being at Exeter in October, 1857, bought some whalebone at 2s. 7d. a pound, and agreed to take a further quantity, which Avery was to send to Bristol by the defendants' railway, the plaintiff agreeing with him to pay the carriage. This was a verbal contract. On the 19th of October, 100 lbs. of whalebone were sent by Avery from Exeter by the Bristol and Exeter Railway, and Avery wrote to inform the plaintiff that he had sent him a bundle of whalebone. On the 21st, the plaintiff wrote to say that he had not received the whalebone, and that he would send a draft for the price when he got it. If the argument of the plaintiff's counsel is well founded, no effect would be given to the promise to send a draft when the whalebone should be received. The plaintiff's letter to Avery, promising to pay for it on its arrival, shews that the plaintiff considered Avery to be the person who was to suffer by a loss; and, indeed, Avery suggested that the plaintiff should make a claim against the Company, and send the amount,

(a) *Norman v. Phillips*, 14 M. & W. 277.

when received from the Company, to him. At common law, upon the sale of an ascertained chattel, on delivery to a carrier the property vested in the vendee. But by the 17th section of the Statute of Frauds "no contract for the sale of any goods, wares and merchandizes, for the price of 10*l.* sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and *actually receive* the same, or give something in earnest to bind the bargain, &c., or that some note or memorandum in writing of the said bargain be made and signed," &c. Therefore, unless one of these things have happened, this contract of sale was not good;—not that such a contract is absolutely void, for if either event takes place at any time after the verbal contract, the contract becomes good. In *Elmore v. Stone* (a) the doctrine of a constructive acceptance and receipt was carried a long way. The true rule was acted upon in *Hanson v. Armitage* (b). In *Morton v. Tibbett* (c) the doctrine of *Blenkinsop v. Clayton* (d) was carried to an extent which in that case was correct. But in *Hunt v. Hecht* (e) it was pointed out that, though the case was rightly decided, much was said in the judgment that was open to doubt. One other point was made; viz., that the plaintiff authorized Avery to enter into a contract which renders the Company liable independently of the question of property. But there is no evidence of such a contract. To establish such a liability, it would be necessary to shew that the Company had notice of the obligation they were incurring. My brother *Watson* suggested that, whatever was the effect of the statute as between the vendor and vendee, that as between the plaintiff and defendants the verbal contract and delivery to the defendants gave the

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(a) 1 Taunt. 458.

(d) 7 Taunt. 597.

(b) 5 B. &amp; Ald. 557.

(e) 8 Exch. 814.

(c) 15 Q. B. 428.

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plaintiff such an interest as to entitle him to recover. But the statute says that the contract "shall not be good," in other words, "shall be invalid." Therefore, as there was no evidence that the property passed from Avery, he alone was the proper person to sue.

BRAMWELL, B.—I am of the same opinion. The cases shew clearly that the goods were not the goods of the plaintiff at the time of the delivery of them to the Railway Company. *Norman v. Phillips* (a), and many other cases which have been referred to, establish that where there is a verbal contract for goods within the 17th section of the Statute of Frauds, and no earnest or note in writing of the bargain, there must be some affirmative act of acceptance to make the contract good. I think it would be more sensible to hold that any delivery and receipt is sufficient, unless there is a subsequent refusal to accept. Suppose coals were ordered and shot down in a particular spot for the buyer: I suppose that would be an acceptance though no agent was there to accept them. Now, if that is sufficient, it is difficult to say that delivery at a wharf or to a carrier named by the purchaser is not so. It would have been good sense to say that where a place is appointed for the delivery, if the goods are delivered there it is an acceptance, unless there is a person there who rejects them. According to Lord *Campbell* (b), "there may be an acceptance and receipt of goods by a purchaser within the Statute of Frauds, although he has had no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract." I agree with that. But in such case the party must have done something to waive his right to reject the

(a) 14 M. & W. 277.

(b) In *Morton v. Tibbett*, 15 Q. B. 441.

goods, which has not been the case here. There has, therefore, been no acceptance. Then it was said that, independently of the question of property, the plaintiff had delivered goods to the defendants to be carried for him. If that argument were well founded it would lead to considerable inconvenience, and the plaintiff would only be entitled to nominal damages. The only way, however, in which there was a delivery to the defendants by the plaintiff was under the contract of sale. But the contract of sale was invalid, and therefore no authority to the defendants to receive the goods for him. But it may be said the contract to carry was made in the name of the plaintiff, and that he might ratify it. I do not think that in fact the contract was made in the name of the plaintiff. It is more reasonable to hold that the consignor, when the property is not out of him, does not contract for the consignee.

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WATSON, B.—I agree with the rest of the Court, though I have felt some doubt. The plea denies the delivery of the goods to the defendants by the plaintiff. No question of property is raised by it. The evidence was that the plaintiff directed Avery to send him the goods, and undertook to pay the carriage. It was contended that Avery had power to bind the plaintiff as to the contract for carriage. If the goods had arrived at their destination and had been accepted, the property in them would have been divested from the time of the delivery at Exeter; therefore it is said that was a species of property inchoate and not complete in the plaintiff. That view of the case however leaves the Statute of Frauds out of the question. The contract between the carrier and the person sending the goods depends upon the property. If the property has not passed out of the consignor, he must sue as in the case of goods sent on sale and approval. If, when the goods arrive,



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it is open to the consignee to repudiate them, there is no complete contract. In *Dutton v. Solomonson* (a) it was said that delivery to a carrier was delivery to the vendee, but in that case there was a perfect contract. The proposition was stated more correctly by *Parke, B.*, in *Swain v. Shepherd* (b):—"Generally speaking where goods of a fair merchantable quality are forwarded in pursuance of a written order which binds the person giving the order to receive the goods, the property passes to that person by the delivery to the carrier." The observations of Lord *Kenyon* in *Dawes v. Peck* (c) apply to the other view of the present case. He said, "I cannot subscribe to one part of the argument urged on behalf of the plaintiff, namely, that the right of property on which this action is founded is to fluctuate according to the choice of the consignor or consignee; and that consequently either of them may at his pleasure maintain an action against the carrier for the non-delivery of the goods. In my opinion, the legal rights of the parties must be certain and depend upon the contract between them, and cannot fluctuate according to the inclination of either. This question must be governed by the consideration, in whom the legal right was vested; for he is the person who has sustained the loss, if any, occasioned by the negligence of the carrier; and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured."

Rule absolute to enter a nonsuit.

(a) 3 Bos. & P. 582.

(b) 1 Moo. & Rob. 223.

(c) 8 T. R. 330.

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In the Matter of an Appeal in the Clerkenwell County Court in an Interpleader between C. FURBER, Plaintiff and Claimant, and G. J. STURMEY, Defendant and Execution Creditor.

May 25.

**GRIFFITS**, in Hilary Term (Jan. 14), had obtained a rule calling on the judge of the Clerkenwell County Court of Middlesex, to shew cause why an attachment should not issue against him for contempt in disobeying an order of *Watson*, B.

From the affidavits filed in support of the rule it appeared that an interpleader summons, wherein C. Furber was plaintiff and G. J. SturmeY was defendant, was heard on the 4th of June, 1857, at the Clerkenwell County Court, when judgment was given for the defendant on the 18th of June. Notice of appeal was duly given, but the appeal case was not tendered to the judge for his signature within the time prescribed by the rules and orders for regulating the practice in the County Courts. Some negotiations with respect to a settlement took place between the parties, which, proving unsuccessful, on the 12th of August a draft of the appeal case was delivered by the plaintiff's attorney to the defendant's attorney, who, in consequence of the absence of his counsel, kept it until the 12th of November, when he returned the draft marked "approved." The defendant's attorney afterwards refused to sign the case. On the 26th of November the plaintiff's attorney tendered the case

Judgment having been given in a County Court the plaintiff proposed to appeal. In consequence of delays in settling it, the case on appeal, as agreed to by both parties, was not presented to the judge for his signature till nearly six months after the day when judgment was given. No security for costs of the appeal had been given. The judge refused to sign the appeal case. Thereupon a summons was issued by a Judge at Chambers, in pursuance of 19 & 20 Vict. c. 108, s. 43, to compel him to do so; but no affidavit of the

facts was sworn till two days after the summons issued. On the hearing of the summons the County Court judge did not attend, and an order was made that he should sign the case. The order having been served upon him and disobeyed:—*Held*, first, that, assuming that the summons ought not to have issued except on an affidavit, the want of such affidavit was an irregularity only.

Secondly, that after the order had been served and disobeyed and the rule for an attachment obtained, it was too late for the County Court judge to object that the case was incorrectly stated, or that the summons had issued improperly, and a rule obtained by the County Court judge to set aside the Judge's order on these grounds was discharged with costs.

Also, that, upon the facts, the order that the County Court judge should sign the case was rightly made.

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to the judge for his signature, when, after taking time to consider, he refused to sign it, giving the following reason for his decision :—

“The decision of the Court in this interpleader rested solely on the total absence of legal evidence on behalf of the claimant; it would be impossible therefore, with every desire to relieve those who by delay have lost the power to appeal, to sign this case even were the lapse of time not a fatal objection.

“(Signed) Herbert George Jones.”

“26th Nov. 1857.”

On the 2nd of December a summons was obtained by the plaintiff at the Judge's Chambers of this Court, signed by *Channell, B.*, calling on the judge of the Clerkenwell County Court of Middlesex and the defendant to shew cause “why the said judge should not sign the appeal case, and cause the same to be sealed with the seal of the said Court, the case having been agreed to by the attornies; or why the said case should not be entered, &c., for argument and argued, and all things necessary thereto or therefor be done, without such signature or seal.” The affidavit in support of the summons was sworn on the 4th, but not filed until the 11th of December. The summons was served upon the judge of the County Court on the 7th. On the 8th the plaintiff's and defendant's attornies attended before the Judge at Chambers when the summons was adjourned to the 10th. No one attended on behalf of the County Court judge. On the 11th an order was made by *Watson, B.*, that the County Court judge should “sign the appeal case and cause the same to be sealed with the seal of the Court, and that the appellant should enter into recognizances or give security, to be approved of by the Registrar of the Clerkenwell County Court, for the costs of the appeal.” This order was served on the judge of the County Court on the 14th, and several applications were made to

him to sign and seal the appeal case, which was tendered to him for that purpose; he however refused to sign the case.

In Hilary Term (Feb. 1) *Bovill, Gaselee, Serjt., and Kaye*, for the County Court judge, appeared to shew cause against the above rule for an attachment, when the rule was enlarged to come on with a cross-rule, obtained by *Bovill* on behalf of the County Court judge, calling on the plaintiff to shew cause why the order of *Watson, B.*, should not be set aside.

In support of the latter rule, and in answer to the rule for the attachment, affidavits were produced, setting forth that no case on appeal was presented to the judge for his signature at the Court holden next after the expiration of twelve clear days from the day on which the judgment was pronounced, as required by rule 145 of the rules and orders framed in pursuance of the provisions of the 19 & 20 Vict. c. 108, s. 132: that the case presented to the learned judge for his signature was incorrect in certain particulars: that neither the defendant nor his attorney consented that the case should be presented to the learned judge for his signature: that no statement in writing containing the grounds of dissatisfaction with the judgment was delivered to the registrar of the Court before the rising of the Court on the day when judgment was given, pursuant to rule 132: that no notice in writing of the grounds of appeal had been sent to the registrar pursuant to rule 141: that on the 17th of June the following notice of appeal was delivered to the registrar:—

“In the Clerkenwell County Court of Middlesex.

“George Joseph Sturmey, Plaintiff,

and

“George Burch . . . Defendant.

“Take notice, that Charles Furber, the claimant in the

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interpleader summons herein, intends to appeal against the decision of the learned judge herein, and will give the grounds of such appeal in due time and course.

"To the judge or registrar } (Signed)  
 of the said Court, or } C. V. Lewis.  
 whom it may concern. } Claimant's attorney."

That no security for the costs of the appeal had been given as required by the 13 & 14 Vict. c. 61, s. 14, but the plaintiff's attorney had tendered to the registrar a cheque for 25*l.* on the 23rd of December.

In an affidavit in answer, the plaintiff's attorney stated that the sum of 25*l.* had been the amount of the security agreed upon between himself and the defendant's attorney; that he had always been ready to pay the money into Court, and that the registrar had refused to take the cheque, on the ground that the matter was sub judice.

*Lush* (with whom was *Griffiths*) shewed cause against the rule to set aside the order of *Watson*, B., and supported the rule for the attachment (*a*).—Notice of appeal having been duly given in pursuance of the 14th section of the 13 & 14 Vict. c. 61, the judge was called upon to settle the case and sign it, under the 15th section, and rule 145 of the rules and orders made in pursuance of the 19 & 20 Vict. c. 108. Rule 145 directs that the case shall be signed by the judge, and sealed with the seal of the Court. [*Martin*, B.—Under the Act and rule in question, the judge would not be bound to sign a case which he did not think correctly stated. *Pollock*, C. B.—The County Court judges are entitled to the same independence which we should claim ourselves. I have repeatedly refused to

(*a*) In Easter Term, May 7. Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Channell*, B.

sign bills of exceptions till they were made to accord with my notes.] On the refusal of the County Court judge to sign the case, a summons was issued, in pursuance of the 43rd section of the 19 & 20 Vict. c. 108, from the Judge's chambers, calling on him to shew cause why this act should not be done. The summons was served on the County Court judge, who did not attend before the Judge at chambers. An order having been made on the 11th, was duly served and disobeyed, and thereupon a rule for an attachment was obtained on the 14th of January. No application to rescind the order of *Watson, B.*, was made on behalf of the County Court judge until the 1st of February, when it was too late. He should have come promptly to get the order set aside. The order cannot be treated as a nullity. [*Channell, B.*—Looking at the 43rd section, there is some doubt whether the summons ought to have issued without a preliminary application to a Judge founded on an affidavit. *Pollock, C. B.*—Suppose a rule for a mandamus was obtained, and the affidavits were not sworn until after the granting of the rule, if the objection was taken on shewing cause, the rule would be discharged, but if the objection was not then made, and the rule was made absolute, could it be afterwards taken?] In the case of a rule, the effective process of the Court is the rule nisi; but a summons does not become an order absolute though no cause is shewn against it. Therefore, in the case of a summons the effective process is the order. The section may be read with reference to the practice at Judges' chambers, and as implying, that if the parties proceed by summons they may do so in the usual way.—Even supposing that an affidavit was necessary, the want of it was a mere irregularity, which has been waived. [*Channell, B.*—The argument on the other side is, that the judge is a public officer who ought not to be called upon to leave his duties

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at the pleasure of any person who might choose to summon him.] The process was valid in itself: the judge was therefore bound to appear to it.—The order was served on the County Court judge on the 14th of December, and assuming that he was not bound to attend the summons, he was at least bound to move promptly to set aside the order. The order was valid on the face of it. The application to set aside the order should have been made either in the Vacation or at least in the early part of Hilary Term: *Smith v. Temperley* (a). The fact that the notice of appeal is not in compliance with rule 141 of the rules and orders framed in pursuance of the 19 & 20 Vict. c. 108, will not prevent the superior Court from hearing the appeal: *Daniels, App., Charsley, Resp.* (b). Neither can the delay in preparing and transmitting the case be insisted upon by the respondent whose conduct in part caused it: *Figg, App., Wilkinson, Resp.* (c.)

*Bovill, Gaselee, Serjt., and Kaye* supported the rule to set aside the order of *Watson, B.*, and shewed cause against the rule for an attachment.—In consequence of the delay which had occurred, and the absence of notice of any ground on which the parties were dissatisfied with the judgment, the County Court judge was not bound to sign the appeal. The case was untruly stated, and, not being one proper for appeal, the learned Judge, *Watson, B.*, had no jurisdiction to make the order. [*Bramwell, B.*—Could it be contended that because no debt was due from a defendant to a plaintiff, therefore this Court would have no jurisdiction?] The summons signed by *Channell, B.*, which was the foundation of the order of *Watson, B.*, was issued without jurisdiction. The learned Judge had no power to issue the

(a) 16 M. & W. 273.

(b) 11 C. B. 739.

(c) 9 Exch. 475.

summons except upon an affidavit of the facts: 19 & 20 Vict. c. 108, s. 43. He had no inherent jurisdiction, and therefore none unless he strictly pursued the power given by the statute. "It is, as a maxim, generally true that if an affirmative statute, which is the introduction of a new law, direct a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner" (a). It cannot be assumed that the legislature knew of the practice at chambers. Had it been the intention of the legislature that the ordinary practice in granting summonses should apply to summonses under this section, the words "upon an affidavit of the facts" would not have been found after the words "or a judge thereof." The attempted distinction between a summons and a rule nisi is not well founded. In case of a summons and order, the summons is the process which gives jurisdiction to the judge. [*Pollock, C. B.*—If a rule nisi were granted on an affidavit supposed to have been sworn, but not in fact sworn till the day after the rule was granted, and the other party, not noticing it, filed affidavits in answer, and the rule was made absolute; if the mistake were discovered in the Vacation or next Term, is it contended that the rule absolute could be set aside?] In that case the Court would have had jurisdiction at common law; and by appearing the party would have waived the objection. But there is a distinction between the absence of a proper step when the party is within the jurisdiction, and the absence of an essential requisite in process to bring the party within the jurisdiction. The foundation of the jurisdiction having failed, the order of *Watson, B.*, was not an irregularity, but a nullity. If it was a nullity, the rule for the attachment must be discharged: but the rule to set aside the order is nevertheless not unnecessary. The County Court

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(a) *Dwarris on Statutes*, 641.



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judge has a right to see that an order does not remain on the files of this Court, leading to the inference that he has been guilty of a neglect of duty. Therefore he is correct in asking to have it quashed. The order was a nullity; but if an irregularity only, its irregularity has not been waived, because the County Court judge has done no act to recognize the propriety of the order. The summons shewed a want of jurisdiction upon the face of it; it should have been drawn up on reading an affidavit. Therefore, by disregarding it, the County Court judge did not waive the objections to it. The 145th rule says that "all cases on appeal shall, unless the judge shall otherwise order, be presented to him for signature at the Court holden next after the expiration of twelve clear days from the day on which judgment was pronounced, and shall *then* be signed by the judge, and sealed with the seal of the Court." It is not made imperative upon the judge to sign a case upon appeal at any other time. [*Bramwell*, B.—The rule goes on—"if the appellants do not comply with this rule, the successful party may proceed on the judgment, unless the judge shall otherwise order." This assumes that where the case is not presented for signature within the time, the appeal will remain in force though the successful party may be entitled to issue execution.] The giving security for costs is, by the 14th section of 13 & 14 Vict. c. 61, made a condition precedent to the right to appeal. No security having been given, the appeal was at an end before the order of *Watson*, B., was made.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—These rules are—one for an attachment against a County Court judge for disobedience to an order

of my brother *Watson*; the other a rule to set aside this order. The facts were these:—A judgment had been given by the learned County Court judge, against which it was proposed to appeal. A very considerable time was occupied in settling the case, which was one of interpleader. It ultimately was submitted to the learned County Court judge to sign, in the form in which it was returned as settled and agreed to by the successful party. The learned County Court judge refused to sign it, and wrote upon it a memorandum as follows:—“The decision of the Court in this interpleader rested solely on the total absence of legal evidence on behalf of the claimant; it would be impossible therefore, with every desire to relieve those who by delay have lost the power of appeal, to sign the case even were the lapse of time not a fatal objection.”

A summons was taken out at Chambers, under the 43rd section of the statute 19 & 20 Vict. c. 108, calling upon the County Court judge and the proposed respondent to shew cause why the case should not be signed. No affidavit of the facts had been previously made. This summons was duly served upon, but was not attended by the learned County Court judge or any one on his behalf. The parties to the cause did attend, and affidavits were made and used on both sides. No objection was taken that an affidavit had not been made before the summons issued, and my brother *Watson* made an order “that the County Court judge should sign the appeal case, and cause the same to be sealed with the seal of the court; the case having been agreed by the attornies of both parties.” And upon the facts then before him, all of which appear on the affidavits which were used in shewing cause against the rules, my brother *Watson* had no alternative, but was clearly bound to make it. He states that he was under the impression that all

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that was required was his order, and that the case would be signed at once. The order was served upon the learned County Court judge but he refused to obey it, and in consequence the rule for the attachment (it being the course prescribed by the act of parliament) was obtained. Cause was being shewn against it last Hilary Term, when the counsel for the learned County Court judge applied for and obtained a rule to set aside my brother *Watson's* order, upon the ground that he had no jurisdiction to make it; and the argument upon the rule for the attachment was postponed. Both rules were argued last Term, and we are now to adjudicate upon them.

The only substantial matter contended for before us was that it was essential, to give jurisdiction to my brother *Watson*, that an affidavit of the facts should have been made before the summons issued; and it was argued that, upon the true construction of the section, the jurisdiction was conditional upon such an affidavit being made. We are all clearly of opinion that the jurisdiction is absolute, and that if the provision as to affidavits extends to the case of a summons taken out at Chambers, the circumstance of one not having been made was only an irregularity and should have been relied on at the hearing of the summons, and does not at all affect the validity and force of my brother *Watson's* order.

The rule for setting aside the order must therefore be discharged; and as we all think, upon the facts before my brother *Watson*, it was imperative upon him to make it, and the rule has been drawn up with costs, and, after an intimation that it would probably fail, it must be discharged with costs.

With respect to the other rule, the order of my brother *Watson* having been duly made and not obeyed, the plain-

riff is in strictness entitled to the attachment to compel obedience to the order; and it is too late for the County Court judge now to object that the case was incorrectly stated. But as the object of the attachment is to compel obedience to the order, and as it is not desirable that an incorrect case should be signed, and as we are informed by the County Court judge that the case is incorrectly stated, and we consider it is owing to a misapprehension that he did not shew cause against the summons; we think that we are warranted in delaying giving judgment on this rule till the end of the Term. This will give an opportunity of going before a Judge at Chambers, if it be necessary, and having a proper case signed; and although the learned County Court judge does not seem to have taken a note, which probably is not practicable when such a quantity of business has to be transacted, we hope he will find no difficulty in ascertaining (with the aid of the parties, should he require it) the facts which were proved before him, and amending the case.

We think it right to add that we have the most sincere desire to treat the learned County Court judge with the utmost consideration and respect; but the superior Courts at Westminster and the Judges are not at liberty to decline a jurisdiction imposed upon them by act of parliament, or do other than follow the course there prescribed. This jurisdiction was substituted for the former one by mandamus which was costly and tedious. It is our duty to administer the law as it exists; and if the provision in question be objectionable, as inconvenient or expensive, or be otherwise improper, it is for the legislature and not for us to interpose and afford redress.

Rule to rescind the order of *Watson, B.*,  
discharged with costs.

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FURBER  
v.  
STURMEY.

1858.  
 FURBER  
 v.  
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The case was again mentioned on the last day of this Term (June 12), when it appearing that the County Court judge had signed the appeal case in pursuance of the order, the rule for an attachment was ordered to be discharged on payment of costs by the County Court judge (a).

(a) See 21 & 22 Vict. c. 74, s. 4.

36457 20.  
 Com. A.

In the Matter of an Interpleader issue in the County Court of Yorkshire at Great Driffield, in a Plaint between J. WHITEHEAD and J. A. PROCTER, and T. SLEIGHT, Claimant.

June 8.

A County Court judge having refused to hear an interpleader summons, and ordered money to be paid out of court, with costs to be paid by the claimant, on the ground of the insufficiency of the particulars, a rule was obtained, under the 19 & 20 Vict. c. 108, s. 43, calling on the County Court judge to hear the summons. No cause being shewn the

*JOYCE* had obtained a rule, under the 43rd section of 19 & 20 Vict. c. 108, calling on the judge of the County Court at Great Driffield and the plaintiff, to shew cause why the judge should not hear the interpleader summons issued in this plaint; and why the Court should not make such order with respect to costs in the interpleader and of this application as the Court should think fit.

It appeared from the affidavits that the stock in trade of the defendant Procter, having been seized under an execution out of the County Court of Yorkshire, Sleight caused a notice of his claim to the goods under a deed of assignment to be served on the bailiff. The amount of the levy was paid into court. The bailiff issued an interpleader

Court made the rule absolute; ordering the costs of the rule to abide the event of the interpleader issue, and discharging the claimant from the costs in the Court below.

summons calling on Sleight to appear and state his claim, whereupon a particular with notice of claim was served on the registrar, the high bailiff, and the execution creditor. On the hearing before the judge, it was objected that the claim was insufficient, inasmuch as it did not contain particulars of the goods, as required by rule 130 of the rules and orders for regulating the practice of the County Courts. The judge held the objection good, and ordered the money to be paid out of court to the execution creditor, with costs. The claimant then made a second application to the judge to hear his claim, which was also dismissed with costs. *Regina v. Richards (a)* and *Beswick v. Boffey (b)* were referred to.

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No cause being shewn, *Joyce*, in moving to make the rule absolute, asked the Court to exercise its discretion as to the costs of the application and the costs in the Court below ordered to be paid by the claimant.

PER CURIAM.—There is no ground for ordering the judge to pay costs; the rule must be absolute; the costs of this application to abide the event of the interpleader issue, and, if payable to the claimant, to be paid by the plaintiff; and as to the costs ordered by the County Court judge to be paid by the claimant, let him be discharged from those costs.

Rule accordingly.

(a) 2 L. M. & P. 263.

(b) 9 Exch. 315.

1858.

June 5.

THORNE v. TILBURY and Others.

To an action of trover for goods, the defendants pleaded that the goods were delivered by the plaintiff to the defendants to be by them warehoused and taken care of: that before the delivery the goods had been the property of one T. deceased, and that there was not at the time of the delivery any legal representative of the estate of T.; and that this fact was concealed from the defendants: that afterwards H. obtained letters of administration to the effects of T. and claimed the goods, and forbade the defendants to deliver them to the plaintiff.—*Held* a good plea.

*Seem*, that a warehouseman being a bailee of goods is not estopped from disputing the

**T**ROVER for trunks, boxes, wearing apparel, household furniture, &c.

Plea, by way of defence upon equitable grounds:—That, before the acts complained of were committed, the said goods were delivered by the plaintiff to the defendants, to be by them warehoused, kept and taken care of, and the same did not otherwise come into the possession, custody, dominion, or controul of the defendants; and, before and at the time of the same being so delivered to the defendants, the said goods were part of the goods and effects of one Peregrine Francis Thorne, then deceased, at the time of his death, who died intestate, and were not, nor were any or either of them, the goods of the plaintiff, and there was not then any legal representative of the estate and effects of the said P. F. Thorne: that those facts were concealed from and not made known to the defendants, nor did they have any notice or knowledge whatever thereof, or any reason or ground to believe but that, at the time of the said goods being so delivered to them, the same were the plaintiff's, and they did not ascertain or discover that they were not so until the times hereafter mentioned: that afterwards, and before the committing of the acts complained of, and whilst the defendants had the said goods under the said bailment thereof, one J. Huxham was duly constituted and appointed, and became and was, the lawful administrator of all and singular the goods, chattels

title of his bailor; but that, if the goods are the property of another, he may refuse to redeliver them, if he does so relying upon the right and title and by the authority of that other.

and effects of the said P. F. Thorne at the time of his death, and as such became and was the owner of the said goods, and the same became and were his as such administrator, and that, before the committing of the acts complained of, he claimed and demanded of the defendants the delivery up to him of the said goods, and assumed the property thereof, and forbade them to deliver the same, or any of them, to the plaintiff, and threatened the defendants that they would be liable and responsible to the said J. Huxham if they did; wherefore the defendants detained the same from, and refused to deliver them up to, the plaintiff, and deprived him of the use and possession thereof; and which are the acts complained of.—Demurrer and joinder.

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*R. Vaughan Williams*, in support of the demurrer.—The defendants cannot set up the title of a third person against the person from whom they received the goods. [*Watson*, B.—What answer would they have to an action of trover or detinue by the rightful administrator?] They might plead the bailment by the plaintiff. The ancient practice as to garnishment is stated in Com. Dig. Pleader (2 X. 8.). It is there said, “If A. bails goods of C. to B., in detinue by C. against B. he may plead bailment by A. to be redelivered to him, and pray that he may be garnished (*a*). If the defendant prays garnishment, he ought to proffer the goods in Court. And the goods anciently remained in Court till the plea determined, but now they remain with the defendant till trial” (*b*). In Vin. Abr. Detinue, (C) pl. 7, it is said, “If my bailee delivers it again to me, he is not chargeable to others who have a right to the thing” (*c*). The simple contract in the case of a bailment by deposit is that,

(*a*) Citing *Rich v. Aldred*, 6 Mod. 216.

(*b*) Citing 1 Roll. Ab. 736, l. 5.

(*c*) Citing 7 H. 6, f. 22.



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in consideration of the delivery, the deposittee undertakes to redeliver to the depositor, and he cannot deny the title of the person who has entrusted him. In 2 Black. Com., p. 451, bailment is said to be "a delivery of goods in trust, upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee. \* \* \* \* If a friend delivers anything to his friend to keep for him, the receiver is bound to restore it on demand." In Bac. Abr. Bailment (A) it is said, "If the goods of A. are bailed by B. to C., C. must deliver them to B., for B. cannot pretend to remove or alter that possession committed to him, in order to restore it to the right owner; for the right of restitution must be demanded of him that did the injury, of which C. has no pretence to judge." [*Pollock, C. B.*—That proposition is perfectly intelligible, but it is not law. Roll. Abr. Detinue, p. 607, which is there referred to as an authority for it, relates to a bailment by indenture, which is a different matter (a). In Roll. Abr. Detinue, (C) pl. 4, it is said, "Si mon bailée baile oustre al autre, jeo poie aver detinue vers second bailée" (b). That is quite inconsistent with the doctrine for which the plaintiff contends. *Ogle v. Atkinson* (c) is an authority against you.] The doctrine laid down in *Ogle v. Atkinson* on this point is doubted in a note to Story on Agency, s. 217 (d). [*Bramwell, B.*—In Parsons on Contracts (e), p. 677, it is said, "One question, in regard to the carrier's obligation to deliver goods to the shipper or consignor, has been much agitated, and perhaps is not quite settled. It arises in the case of another party claiming the goods as owner, and taking them in that character from the carrier? Will such taking excuse the

(a) See per *Martin, J.*, 3 H. 6, 44 b.

(b) Citing 11 H. 4, 46 b.

(c) 5 Taunt. 759.

(d) Citing *Gosling v. Birnie*, 7 Bing. 339; Paley on Agency, 80, 81.

(e) Boston, 1853.

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carrier for non-delivery? If the goods are demanded from him by a third party on this ground, can he detain the goods and justify his conduct? It is quite certain that the carrier cannot himself raise the question of title in a third person, and on that ground refuse delivery to the party originally holding them (a). And it is undoubtedly the general rule that the carrier cannot deny the title of the party from whom he has received the goods for transportation. In general, no agent can defend against the action of his principal by setting up the *jus tertii* in his own favour.”] The bailee of goods stands in the same position with regard to the bailor as an agent does to his principal, or a servant to his master. He cannot dispute the title of his bailor: *Gosling v. Birnie* (b), *Dixon v. Hamond* (c). He is estopped from doing so. [Pollock, C. B.—Heath, J., in *Ogle v. Atkinson* (d), points out the distinction between a case like this and the absolute right of a landlord who has delivered possession of land to a tenant to have it delivered back, which he says is peculiar to the action of ejectment. Now, although the Courts have since held that the same doctrine applies in other actions, it does not extend to mere chattels. However, to the marginal note, that “a warehouseman, receiving goods from a consignee, who has had actual possession of them, to be kept for his use, may nevertheless refuse to redeliver them if they are the property of another,” should be added, “if he defends upon the right and title and by the authority of such other.”] In *Cheesman v. Ezall* (e), Martin, B., said that there were numerous cases connected with wharfs and docks in which, if the party entrusted with the possession were not estopped from denying the title of the

(a) Citing an *Anonymous case*, tried before Gould, J., and referred to *Laclouch v. Towle*, 3 Esp. 114.

(b) 7 Bing. 339.

(c) 2 B. & Ald. 310.

(d) 5 Taunt. 759.

(e) 6 Exch. 344.

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party from whom he received it, it would be difficult to transact commercial business. [*Watson*, B.—In the present case, at the time of the bailment, the bailor had a defeasible title; if he had obtained letters of administration his title would have been confirmed. When another person obtained letters of administration, the title of the bailor was defeated.] The defendants have not been compelled to give up the property to the claimant. In *Roberts v. Bell* (a) *Crompton*, J., said, “It would be very dangerous if, in cases where bankers are pledgees of available property, such as bills of lading or bills of exchange, they could deprive the pledgor of the use of his property by keeping it on account of a claim.” *Crawshay v. Thornton* (b) shews that a bailee cannot call upon his bailor to interplead with a stranger claiming by title paramount; nor would a Court of common law, under the Interpleader Act, relieve the defendants from the consequences of their contract: *Horton v. The Earl of Devon* (c).

*J. Brown*, in support of the plea.—It is clear that the defendants would have been liable to the true owner: *Wilson v. Anderton* (d).—(He was then stopped by the Court.)

*POLLOCK*, C. B.—It is not necessary to go through all the authorities which have been cited. The plea does not raise the point argued. It leaves it to be disclosed on the trial under what circumstances possession was obtained by the defendant. It is open to the defendant to contend that, assuming the law to be as argued on behalf of the plaintiff, under the circumstances disclosed by the plea, and not varied by a replication, but admitted, the defendants' answer

(a) 7 E. & B. 323.

(b) 2 Myl. & Cr. 1.

(c) 4 Exch. 497.

(d) 1 B. & Ad. 450.

is good. It is consistent with the facts before the Court, as appearing on the pleadings, that the goods were delivered to the defendant for the purpose of safe custody till it should be found out who was entitled to take out administration. Therefore a defence setting up the title of the administrator is good.

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MARTIN, B.—I do not see why the facts might not be given in evidence under a plea denying that the goods were the goods of the plaintiff. It is absurd to say, that because the defendant took the goods from the plaintiff he cannot deliver them up to the true owner, but must be liable to two persons.

BRAMWELL, B.—I think the plea is good on the ground adverted to by my brother *Watson*. It shews matter supervening upon the title of the plaintiff, which was a possessory one, and which is not controverted. The case is analogous to one where a tenant says to his landlord “you had a title at the time when you let me into possession, but have not now.” It cannot be law that a person guilty of no default is liable to two persons, though the bailor would not be liable over to him on the ground that he had warranted the title. The plea shews that the plaintiff’s title by possession has ceased.

WATSON, B.—I am of the same opinion. The plea states that the goods were the goods of one Thorne, deceased: that, no administration having been taken out, the plaintiff deposited them for safe custody with the defendant. I at one time fancied that the plaintiff was executor de son tort; but merely keeping the goods in safe custody does not make him so. Though the plaintiff has not a good title as against the administrator he had as against all the rest of the world,

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and he might have taken out administration and so perfected his title. But another person did that which defeated his title. The present plaintiff claims to recover by reason of an estoppel. Now, if he is right, the defendant could not call upon him to interplead with the rightful administrator either at law or in equity, but the plaintiff must recover the full value. The rightful administrator would also be entitled to recover the full value against the defendant. However, without any astute argument, it is clear that the defendant must be at liberty to shew that the plaintiff had a defeasible title, and that such title has been defeated.

Judgment for the defendant (a).

(a) In *King v. Richards*, 6 Wharton, 418, the defendants, common carriers of goods between New York and Philadelphia, had signed a receipt for certain goods as received of A., which they promised to deliver to his order. In trover, by the indorsee of this paper, who had

made advances on the goods, it was held that the defendants might prove that A. had no title to the goods; that they had been fraudulently obtained by him from the true owner, and that upon demand made they had delivered them up to the latter: *Parsons on Contracts*, p. 678, *note*.

June 8.

GOWENS v. MOORE.

Judgment having been given for the plaintiff in an action on a bond in the penal sum of 20*l.*, conditioned for the payment of 12*l.*:—*Held*, that the plaintiff

*D. D. KEANE*, for the defendant, had obtained a rule to shew cause why the Master's allocatur should not be set aside.

The action was upon a bond in the penal sum of 20*l.* conditioned for the payment of 12*l.*—The declaration was in the common form; there was one plea, to which there

was deprived of costs by the 13 & 14 Vict. c. 61, s. 11, on the ground, first, that the nominal damages did not make the sum recovered exceed 20*l.*; and secondly, per *Pollock*, C. B., and *Watson*, B., that the sum recovered within the meaning of that section was 12*l.* only.

was a demurrer on which judgment had been given for the plaintiff. Upon this the Master had taxed and allowed the costs of the action to the plaintiff.

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*Prentice* now shewed cause.—The action being upon a bond, the penalty is the debt: 1 Saund. 58 b. The judgment is entered up for the sum of 20*l.* and 1*s.* damages. [*Pollock*, C. B.—Is the plaintiff entitled to damages as of course? *Beaumont v. Greathead* (a) seems to shew that he is not.] The practice has always been to enter up judgment in that way. The plaintiff has recovered a sum exceeding 20*l.*, and is therefore not deprived of costs by the 13 & 14 Vict. c. 61, s. 11.

*Keane*, in support of the rule, was not called upon.

POLLOCK, C. B.—We cannot put a technical interpretation on the words of this statute, but must construe it according to the ordinary meaning of the words as commonly understood. What the legislature meant by the word recover was what the plaintiff is to get and put into his pocket. Here he will only get 12*l.*

BRAMWELL, B.—I am also of opinion that the rule must be absolute. I am not satisfied that Mr. *Prentice* is not right in his contention that the penalty is the sum due. If the penalty of this bond had been 30*l.*, I am not sure that the defendant might not have been arrested. But from *Beaumont v. Greathead* (a) it appears that nominal damages are something which has no existence in point of quantity. When you give expression to them you mention some coin. But they will not make 20*l.* more than 20*l.* by being added to it. Under the old practice, judgment was signed for the

(a) 2 C. B. 494.

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debt and something more, because there was a technical necessity for putting down some coin beyond the debt. The origin of the 95th section of the Common Law Procedure Act, 1852, which abolished the distinction between debt and damages for this purpose, was a case like the present, where a person paying money into Court doubted whether he was not bound to pay in something more for damages. The object was to ascertain the legal amount due, and that judgment should in all cases be given according to that. I decide the case on the ground that the proper judgment is that the plaintiff was entitled to recover 20*L*.

WATSON, B.—I think the rule must be made absolute for two reasons. First, damages are given on the ground of the supposed detention of the debt. The 1*s.* nominal damages are not a reality. Such nominal damages are never *recovered*; they are merely put on the record for the purpose of giving costs. Therefore, on that view of the case, the plaintiff has only recovered 20*L*. But, in fact, he only recovered 12*L*, though there is a formal entry on the record of a judgment for 20*L*; and I think that, for the purposes of this statute, we must look at the substance and not merely at the entry on the record.

Rule absolute (*a*).

(*a*) See *Johnson v. Harris*, 15 Exch. 440; *Hodges v. Callaghan*, C. B. 357; *Blew v. Steinau*, 11 2 C. B., N. S., 306.



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THE LONDON MONETARY ADVANCE AND LIFE ASSURANCE  
COMPANY (REGISTERED) v. SMITH.

May 31.

THE declaration commenced by stating that "The London Monetary Advance and Life Assurance Company (Registered) by &c., their attorney, sue" &c.: it then alleged that the defendant detained from the plaintiffs their goods.

Plea.—That the alleged causes of action accrued, and this action was commenced, after the 2nd day of November, 1857, and not before; and that the said Company was and is a Company formed, constituted, and completely registered under the act of parliament passed in the session holden in the 7th and 8th years of the reign of her present Majesty for the registration, incorporation and regulation of Joint Stock Companies; and the said Company did not on or before the 2nd day of November, 1857, nor at any time before the commencement of this action, nor any time since, register nor become nor is it registered, under the Joint Stock Companies Acts, 1856, 1857, or either of them, pursuant to the said last mentioned Acts or either of them, but has always made default in so doing. And the defendant further says that the said Company was and is formed and constituted and carries on business for divers other purposes than the purpose of banking or insurance, to wit, for the purpose of lending and advancing money. And that the said claim does not arise out of or relate to any matter of banking or insurance, but the same arises wholly out of

The 27th section of "The Joint Stock Companies Act, 1857," which requires every Company registered under the 7 & 8 Vict. c. 110, "but excluding any Company formed for the purpose of insurance," to register under The Joint Stock Companies Acts, 1856, 1857, on or before the 2nd November, 1857, only exempts from such registration Companies formed for the purpose of insurance only. Therefore where a Company completely registered under the 7 & 8 Vict. c. 110, formed for the purpose and carrying on the business of insurance and also the lending of money, made default in registering

under those Acts:—*Held*, that by the 28th section of The Joint Stock Companies Act, 1857, such Company was incapable of suing at law or in equity.



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and relates wholly to an assignment of the goods in the declaration mentioned, made by one A. Peck to the said Company solely and exclusively in their character of money lenders, that is to say, solely to secure the repayment to them by the said A. Peck of certain monies lent and advanced by them to the said A. Peck, and the interest and expenses in respect thereof.

Replication.—That the plaintiffs were and are a Company formed for the purpose of insurance.

Rejoinder.—That the said Company was and is formed and constituted and carries on business for divers purposes other than and besides and in addition to the purpose of or of carrying on the business of insurance, that is to say, for the said other purposes in the plea mentioned; and that the plaintiffs' said claim does not nor did arise out of or relate to any matter of banking or insurance, but the same has arisen wholly out of and relates wholly to the said matter in the said plea in that behalf mentioned.

Demurrer and joinder therein.

The question raised by the pleading is, whether a Joint Stock Company formed for the purpose of insurance and *also for another purpose*, and registered under the 7 & 8 Vict. c. 110, is bound to register under "The Joint Stock Companies Acts, 1856, 1857."

*Wordsworth*, in support of the demurrer (a).—It is admitted on the record that the plaintiffs are an insurance Company constituted under the 7 & 8 Vict. c. 110. By the 27th section of the Joint Stock Companies Act, 1857, 20 & 21 Vict. c. 14, "Every Company completely registered under the 7 & 8 Vict. c. 110, including any Company that has obtained a certificate of complete registration under 'The

(a) Before *Martin*, B., *Bramwell*, B., and *Watson*, B.

Limited Liability Act, 1855,' but *excluding any Company formed for the purpose of insurance*, shall, if it has not already registered under the principal Act, register under the Joint Stock Companies Acts, 1856, 1857, on or before the 2nd day of November, 1857, or incur such penalty as is hereinafter mentioned." The 28th section imposes the penalty, and declares that, on default in registering, "the Company shall be incapable of suing either at law or in equity." The Joint Stock Companies Act, 1856, 19 & 20 Vict. c. 47, s. 2, declares that "This Act shall not apply to persons associated together for the purpose of banking or insurance." The Joint Stock Companies Act, 1857, 20 & 21 Vict. c. 14, s. 2, declares that "The Joint Stock Companies Act, 1856, and this Act, shall, so far as is consistent with the context and objects of such Acts, be construed as one Act." By the 20 & 21 Vict. c. 80, s. 1, "The Joint Stock Companies Acts, 1856, 1857, shall not, nor shall either of them, be deemed to have repealed, as respects Companies already formed for the purpose of carrying on the business of insurance under the 7 & 8 Vict. c. 110, &c., the 7 & 8 Vict. c. 110, or any other Act, amending the same or relating to such Companies." The obvious intention of the legislature was that insurance Companies should continue to be regulated by the 7 & 8 Vict. c. 110. Two classes of Companies are contemplated, viz., Companies formed for commercial purposes, and Companies formed for the purpose of insurance. This Company is within the latter class. Moreover, the plea does not allege that this is a Company required to be registered under the 7 & 8 Vict. c. 110, and, if so, the 27th section of the Joint Stock Companies Act, 1857, does not apply to it.

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*Norman* appeared in support of the plea, but was not called upon to argue.

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MARTIN, B. (a).—I am of opinion that the defendant is entitled to judgment. The plaintiffs sue as The London Monetary Advance and Life Insurance Company (Registered), and they proceed in their declaration in the usual form. The plea states that the Company was completely registered under the 7 & 8 Vict. c. 110, and that must be taken to mean “registered as mentioned in the declaration.” By the 27th section of the Joint Stock Companies Act, 1857, every Company completely registered under the 7 & 8 Vict. c. 110, but excluding any Company formed for the purpose of insurance, shall register under the Joint Stock Companies Acts, 1856, 1857, on or before the 2nd of November, 1857, or incur such penalty as is thereafter mentioned. So that every Company completely registered under the 7 & 8 Vict. c. 110, except any Company formed for the purpose of insurance, has a duty imposed on it by the 27th section of the Joint Stock Companies Act, 1857, to register, on or before a certain day. The plea goes on to state that the Company was not registered under the last mentioned Act, and was formed for carrying on business for other purposes than that of insurance. That statement is borne out by its title, “The London Monetary Advance and Life Insurance Company.” The answer which the plaintiffs give is, that they are a Company formed for the purpose of insurance. That is a bad replication: they ought to have gone on to say that it was formed for the purpose of insurance *only*. A Company carrying on the business of insurance and also of lending money is not a Company formed for the purpose of insurance, within the meaning of the 27th section of the Joint Stock Companies Act, 1857. Then, by the 28th section, every Company required to register under the Joint Stock Companies

(a) *Pollock*, C. B., was not present during the argument.

Act, and making default, shall be incapable of suing either at law or in equity.

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WATSON, B.—I am of the same opinion, and my brother *Bramwell* also concurs (a). The Company was completely registered under the 7 & 8 Vict. c. 110. Then the Joint Stock Companies Act, 1857, requires that every Company completely registered under the 7 & 8 Vict. c. 110, shall be registered under the Joint Stock Companies Acts of 1856 and 1857, except any Company formed for the purpose of insurance. The plea alleges that this is a Company carrying on business for other purposes than that of insurance, to wit, for the purpose of lending and advancing money. An insurance Company lending money on mortgage or otherwise is not within the 27th section of the Joint Stock Companies Act, 1857, but there the lending money is not a part of the business of the Company. In this case it is. To exempt the Company from registration it must be formed and carry on business for the purpose of insurance only.

Judgment for the defendant.

(a) *Bramwell*, B., left the Court at the conclusion of the argument.

# HILL v. FOX.

June 12.

*PETERSDORFF*, Serjt., moved for a rule nisi to rescind an order of *Watson*, B., that the defendant should give security for costs.

Where a  
defendant  
residing out  
of the juris-  
diction, against  
whom a judg-

ment had been obtained in this Court, under which nothing had been realized, tendered a bill of exceptions, this Court, at the instance of the plaintiff, stayed the proceedings until security for costs of the bill of exceptions and in error had been given by the defendant, without interfering with the plaintiff's liberty to proceed on his judgment.

Per *Pollock*, C. B. and *Watson*, B.—Such order does not stay the sealing of the bill of exceptions.

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v.

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No affidavits were filed, but the following facts appeared from the statement of counsel :—On the trial of the cause, in which the plaintiff obtained a verdict at the last Spring Assizes for Surrey, the defendant, who resided in Jersey, out of the jurisdiction of this Court, had tendered a bill of exceptions to the ruling of the learned Judge. The bill of exceptions had never been sealed or settled, and nothing had been realized under the judgment. On the application of the plaintiff, *Watson*, B., had made an order that “the proceedings in the action should be stayed until security for costs in and relating to the bill of exceptions and error should be given to the satisfaction of the Master; the plaintiff to be at liberty to proceed to enforce his judgment in the mean time.”

*Petersdorff*, Serjt., in support of the application.—A defendant cannot in any case be compelled to give security for costs. By the 148th section of the Common Law Procedure Act, 1852, a writ of error shall not be used in any cause, but “the proceeding to error shall be a step in the cause.” Therefore the defendant, though he takes the proceeding in error, continues to be a defendant. In any event the bill of exceptions ought not to have been stayed; it is not a proceeding in error at the present stage of the cause. [*Watson*, B.—I think that the order does not stay the sealing of the bill of exceptions. *Pollock*, C. B.—Perfecting the bill of exceptions is merely doing that which the law supposes to have been done already.] If the proceeding in error is to be stayed, proceedings on the judgment ought also to be stayed.

*Lush*, shewed cause in the first instance.—The defendant, in a case like the present, becomes an actor; he is in the same position as a defendant who brought a writ of error before the passing of the Common Law Procedure Act, 1852.

The case of *Lewis v. Owens* (a) is an authority that a defendant below may be ordered to give security for costs, and that such order may be made by this Court. In *Haygarth v. Wilkinson* (b), where the plaintiff in error, (defendant below), had died insolvent, the Court of Exchequer Chamber, at the instance of the defendant in error, (plaintiff below), stayed proceedings in error till security for costs should have been given to the defendant in error. In *Bougleux v. Swayne* (c), a plaintiff, who had suggested error, was ordered to give further security for costs in the Court of error, though he had given security in the Court below, notwithstanding that there was no precedent for it. The position of the defendant in no way differs from that of a plaintiff commencing an action. There is no reason why the plaintiff's proceedings should be stayed because the defendant has not given security for costs. The effect of such an order would be to stay the hands of the plaintiff till the defendant chose to allow him to proceed. Error would not stay the plaintiff's proceedings unless bail in error was put in.

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POLLOCK, C. B.—There will be no rule. The Court is bound in consistency to take care that no plaintiff, or defendant in any proceeding which makes him an actor, shall take any steps which may cause expences to the other party unless the latter has some legal remedy to recover it. In the case of a plaintiff, the Court will not, under certain circumstances, allow him to sue except upon the terms of giving security for costs. But if a plaintiff has obtained judgment, from which the defendant seeks to be relieved, the situation of the parties is reversed, and the Court on similar principles is bound to stay the proceedings of the defendant, who is then an actor. I think we are bound by principle,

(a) 5 B. &amp; Ald. 265.

(b) 12 Q. B. 851.

(c) 3 E. &amp; B. 829.

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and by the authority of the cases cited, to say that the order was properly made.

BRAMWELL, B.—I am of the same opinion, though I am not sure that we are not establishing a precedent in holding my brother *Watson's* order to be correct. The Common Law Procedure Act, 1852, did not alter the rights of the parties. Before that Act the plaintiff in error, as a plaintiff, was liable to have his proceedings stayed till he gave security for costs. Why, then, should not a defendant who proceeds to error give security? It is said to be hard because the plaintiff's hands are not stayed. But the plaintiff is not allowed to go on in the same proceeding.

WATSON, B.—When the case was before me at Chambers I gave full consideration to the authorities, though I thought that it fell within the general principle. The defendant becomes in effect a plaintiff in error; he resides abroad and execution against him is valueless; then if he proceeds in error the case seems to come within the rule. In *Bougleux v. Swayne* (a) the plaintiff had given security for costs to an amount not sufficient to cover the costs in error. On an application that the plaintiff should give additional security for the costs in error, the Court made the order though there was no precedent for it. *Lewis v. Owens* (b) is in effect an authority that a plaintiff in error, defendant below, may be ordered to give security for costs. At the date of that decision a defendant in error could not have issued execution. Therefore the order of the Court, that unless the plaintiff in error gave security for costs the defendant in error should be at liberty to proceed on the judgment, was in effect saying that the plaintiff in error should give security.

Rule refused.

(a) 3 E. & B. 829.

(b) 5 B. & Ald. 265.

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## THE LIVERPOOL BOROUGH BANK v. MELLOR.

June 11.

**T**HIS was an action to recover the moiety of a sum of 6,433*l.* 19*s.* 4*d.*, the balance of a banking account due in May, 1855, from the defendant and his then copartner to the Liverpool Borough Bank. The declaration commenced by stating that the plaintiffs were a banking Company, duly registered under the 20 & 21 Vict. c. 49, and were legally carrying on the business as bankers until their said registration. The defendant, who was under terms of pleading issuably, took out a summons at chambers for leave to plead the following several matters:—

1. Traverse of registration of banking Company.
2. Traverse that the Company were carrying on business as bankers until registration.

3. That before registration the Company had stopped payment, and ceased to carry on business as bankers.

4. That before registration the Company had lost their reserve fund and more than one-fourth of their paid up capital, whereby they ceased to carry on legally the business of bankers.

4. Never indebted.

6. Payment.

7. As to 6,433*l.* 19*s.* 4*d.*, parcel, &c., that the Company induced other creditors of the defendant and his then partner to accept, and agreed with them to accept, a composition of 10*s.* in the pound in discharge of the said sum.

8. As to the said 6,433*l.* 19*s.* 4*d.* and interest, &c.—Plea on equitable grounds: that the Company pretended to other creditors of defendant and his then partner that they the said Company would accept such composition, whereby divers of such creditors were induced to accept the same;

In an action by a banking Company, established under the 7 Geo. 4, c. 46, and suing as a Company registered under the 20 & 21 Vict. c. 48, s. 6, the Court allowed the defendant to plead, together with pleas going to the merits,—  
1st. Traverse of registration of Company.  
2. Traverse, that the Company was carrying on business as bankers until registration. 3. That before registration the Company had stopped payment and ceased to carry on business as bankers.  
4. Nul tiel corporation. But the Court refused to allow the defendant also to plead—  
That before registration the Company had lost their reserve fund and more than one-fourth of their paid-up capital, whereby they ceased to carry on legally the business of bankers.



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and that afterwards the Company, unknown to and in fraud of the said other creditors, induced the defendant and his said partner, by threats and undue influence, to pay them 10s. in the pound upon the said sum without taking the same in full satisfaction and discharge.

The summons was heard before *Channell*, B., who ordered "that the fourth plea be disallowed, and that the defendant elect between the first, second, and third, or the fifth, sixth, seventh, and eighth.

*Heath*, in the present Term (June 8), obtained a rule to shew cause why the order of *Channell*, B., should not be rescinded; and why the defendant should not be allowed to plead all the said eight pleas, and also the plea of "nuptial corporation." The affidavit in support of the application (which verified the pleas) stated, amongst other things, that the Company was a joint stock banking copartnership, according to the provisions of the 7 Geo. 4, c. 46, and that while they were insolvent they caused themselves to be registered under "The Joint Stock Banking Companies Act, 1857," for the purpose of being wound up under the Acts of 1856 and 1857, and that a petition for that purpose had been presented to the Master of the Rolls.

*Mellish* now shewed cause.—The pleas were properly disallowed. The substantial question intended to be raised is, whether a banking copartnership, established under the 7 Geo. 4, c. 46, can, after it has stopped payment, be registered under the 20 & 21 Vict. c. 49, s. 6, for the purpose of being wound up. *In the Matter of the Northumberland and Durham District Banking Company (a)*, *Kindersley*, V. C., was of opinion that the registration of such a Company, after its suspension of payment, was valid. On appeal, *Turner*, L. J., was of the same opinion; but *Knight Bruce*,

(a) 27 L. J. Chan. 354, 356.

L. J., considered the registration void. There, however, the question arose between the Company and some of its creditors; here it is between the Company and one of its debtors. But, assuming the registration void, the only consequence is that the action must be brought in the name of the public officer: 7 Geo. 4, c. 46, s. 9. Therefore the defendant, who is under terms of pleading issuably, is not entitled to plead pleas which in effect say that the action ought to be brought in the name of another party, together with pleas going to the merits. The fourth plea is either the same as the third, or it is frivolous. The plea of nul tiel corporation only raises the same question as the three first pleas.

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*Heath*, in support of the rule.—All the pleas are issuable. The defendant's object is to guard against being again called upon to pay the money, which he would be liable to if the registration of the Company is void. The former decisions as to pleading inconsistent matters scarcely apply, because now a defendant must pay the costs of the issues on which he fails.—He referred to *Woolf v. The City Steam Boat Company* (a).

Per CURIAM (b).—Let the fourth plea be struck out; and the rule will be absolute for the defendant to plead all the other pleas.

Rule absolute accordingly.

(a) 7 C. B. 103.

(b) *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Watson*, B.

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June 3 &amp; 4.

SMITH v. THOMAS M'GUIRE.

Where a person permits another to act as his *general agent*, he is bound by a contract made by the agent, although the latter declares himself as acting "by *procuracion*," and has received special instructions which he exceeds.

The defendant, who formerly carried on the business of a corn merchant at Limerick, came to reside in London, and left his brother M. to conduct his business in Limerick. The defendant's name remained over the door. For the space of three years M. purchased large quantities of oats, and chartered numerous ships

on account of the defendant. On these occasions the defendant usually sent him special instructions. In the year 1858, a ship in the port of Limerick being about to proceed to Quebec for a cargo of timber, M. chartered her to carry, on her return from Quebec, a cargo of oats to London. He signed the charter-party "per *procuracion*." In an action against the defendant for not loading a cargo pursuant to the charter-party:—*Held*, that it was properly left to the jury to say whether the defendant had allowed M. to act as his *general agent*, and if so, he was liable although M. might have exceeded his authority.

In an action against the charterer of a ship for not loading a cargo, the measure of damage is the amount of freight which would have been earned after deducting the expenses, and also any profit which the ship may have earned, during the period over which the charter extended.

*Seem*, that the shipowner is not bound to take a new cargo for the most he can get, in order to reduce the damages to be paid by the charterer.

**DECLARATION**—That, by charter-party between the plaintiff and the defendant, it was agreed that the ship "Mahtoree," being tight, staunch and strong, and every way fitted, would, at Limerick, load a full cargo of oats for London, after discharging her timber from Quebec, at the rate of 2*s.* per imperial quarter, with 8½ per cent. *primage*: the said ship to discharge in the stream in London; twelve days for loading the ship in Limerick, and the usual time for discharging in London, say three Mondays' markets; if longer detained, to pay by the affreighters or their assigns three guineas per day demurrage, &c.: ship to be reported at Limerick by Mulloch and Sons or their agents at the port of discharge. And the defendant, by the said charter-party and agreement, agreed to load the said ship in accordance with the terms of the said charter-party.—Breach: that though all things had happened, &c., and all time, &c., had elapsed, and plaintiff had been ready and willing, &c., and although the ship was before the breach tight, staunch, and strong, yet the defendant would not load the ship; whereby, &c.—There was also a count for demurrage.

Pleas to the first count:—First, denial of the agreement:

Secondly, that the ship was not ready to receive the cargo at the time and place agreed on: Third, to the second count, Never indebted.

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The defendant took out a summons for particulars of demand. This was opposed by the plaintiff before a Judge at Chambers, but was ordered, it being alleged that it was intended to pay money into Court. A summons to plead a plea of payment into Court was afterwards taken out, but was abandoned and the above pleas pleaded.

The particulars of demand were as follows:—The plaintiff seeks to recover 122*l.* 17*s.* for demurrage for detaining the ship mentioned in the first count from the 1st January, 1858, to the 9th February in the same year. And the plaintiff also claims the sum of 68*l.* 8*s.* 9*d.* for loss in chartering and letting the ship for hire, during the time it was agreed to be hired by the defendant, for a less sum of money, namely sixpence for each quarter of oats, than the defendant had agreed to pay for the use of the ship, and the proportion of primage thereon.

At the trial, before *Martin*, B., at the Middlesex Sitzings in last Easter Term, it appeared that the charter-party, on which the action was brought, bearing date the 3rd of August, 1857, was signed by Martin M'Guire, "per proc. of Thomas M'Guire." In order to shew that Martin M'Guire was the agent of the defendant, it was proved that the defendant had carried on business at Limerick as a corn merchant till about three years previous to the signing of this charter, when he left Limerick and went to London, leaving Martin M'Guire, who was his brother, to conduct the business, which consisted in buying up corn for shipment. It was proved to be usual and prudent to charter vessels beforehand for the purpose of forwarding corn, and that Martin M'Guire had on previous occasions hired ships and signed charter-parties "per proc." for the defendant.

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On the 19th of December, Messrs. Mulloch, who acted as brokers for the charterers, wrote to inform the plaintiff that the charterer could not load the vessel. On the 1st of January, 1858, the vessel was ready to receive her cargo, of which due notice had been given on the previous day to Martin M'Guire. The ship having lain twelve days according to the charter, notice was given on the 13th of January that she was on demurrage pursuant to the charter. The ship lay till the 9th of February, when she was chartered by several persons, of whom the defendant was one, to carry a cargo of oats to London, at 1s. 6d. a quarter. Martin M'Guire signed this charter-party for the defendant "per proc." The captain stated that he could not get a charter sooner.

The defendant's case was, that Martin M'Guire had no general authority to charter vessels for him. The defendant proved that on former occasions he had sent special instructions to Martin M'Guire as to chartering vessels, and that he never authorized him to sign this particular charter. As to the damages, it was proved that the plaintiff might have got a cargo at an earlier period, if the captain would have allowed the broker, Mulloch, to fix a cargo on the 26th of January. This the captain refused to do, without consulting the plaintiff.

The learned Judge asked the jury whether Martin M'Guire was permitted and allowed by the defendant to act as his general agent at Limerick, and told them that, if so, it was not material what the private arrangement between them was. With respect to the damages, his lordship told the jury that the claim in the particulars was not a proper estimate of the damage: that the legal damage was the loss which had arisen from the breach of the contract; that from the amount of freight which the ship would have earned if the charter-party had been performed, there ought to be

deducted the expenses which would have been incurred in earning it, and also any profit which the ship earned between the expiration of the lay days and the time when the employment of the ship under the charter-party would have ended. The jury found a verdict for the plaintiff, with 191*l.* 5*s.* damages, being the 122*l.* 17*s.* for demurrage for thirty-nine days, at 3*l.* 3*s.* a day, and 68*l.* 8*s.*, the difference between the freight earned under the second charter and that which would have been receivable under the first.

*Shee*, Serjt., in the following Term, obtained a rule nisi for a new trial, on the ground that the learned Judge had misdirected the jury in telling them that they were at liberty to infer, from the fact that Martin M'Guire had for a long time signed charter-parties for the defendant and acted as his agent, that he had authority to sign this charter-party; or why the damages should not be reduced to 68*l.* 8*s.*, or such other sum as the Court should think fit, on the ground that the plaintiff was not entitled to compensation for the detention of the ship during the lay days, or for the interval between the expiration of the lay days and the 9th of February.

*Prentice* and *Gordon Allan* now shewed cause.—First, there was no misdirection. The defendant's case was, that Martin M'Guire was not his agent to charter vessels for him. But he had held him out to the world as having such authority. [*Pollock*, C. B.—Whatever may be the interior arrangement of any house of business, if the party conducting it is allowed to act as if he had a general authority, if there is any loss by reason of his exceeding the authority given to him it must fall on those who enable him to appear clothed with such authority. *Martin*, B., referred to *Hawken v. Bourne* (a).] The law on this subject is thus stated

(a) 8 M. & W. 703.

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in Addison on Contracts, p. 626, 627, 4th ed.:—"In all these cases, the existence of an implied authority to bind the principal is a question of fact to be determined by a jury from a careful consideration of the surrounding circumstances; the rule of law being that, wherever the principal by his conduct has held out the agent to the parties dealing with him as having a general power to act in the premises, his acts bind the principal; and the liability of the latter upon the contract cannot be qualified by the existence of any private instructions which the agent may have exceeded. The principal cannot cut down or circumscribe the apparent general authority by secret limitations and restrictions, of which the parties dealing with the agent are entirely ignorant. 'The agent's neglect,' observes Pothier, to follow my secret instructions, may give me a right of action for damages against him, but cannot exonerate me from liability towards the party with whom he has contracted in my name conformably to his apparent authority; otherwise there would be no security for those who contract with absent persons through the medium of an agent.'"—Secondly, it is conceded that the jury have not assessed the damages on the right principle; but the direction of the learned Judge in that respect was correct. The true criterion of damages is the freight which would have been earned if the defendant had loaded a full cargo, deducting therefrom the expenses: Abbott on Shipping, p. 257, 8th ed. If the jury had calculated the damages according to the direction of the learned Judge, without regard to the claim in the particulars, they would have given the plaintiff a larger amount.

*Shoe, Serjt.*, in support of the rule.—It is not denied, that if an agent who has only a special authority, is permitted by his principal to act as if he had a general authority, the

principal is bound by his contracts. But that doctrine must be taken in conjunction with this rule, "that the extent of the agent's authority is (as between his principal and third parties) to be measured by the extent of his usual employment:" Smith's Mercantile Law, p. 134, 5th ed. Here it was proved that on previous occasions the defendant had sent special instructions to his brother respecting the charter of ships. The latter may have had authority to charter a particular ship about to *arrive* at the port in Ireland, but this charter was an excess of authority. Moreover a person who executes an instrument "by procuration" declares that his authority is limited: Byles on Bills, p. 27, 7th ed. *Alexander v. Muckenzie* (a) 'expressly decided that the acceptance or indorsement of a bill of exchange, expressed to be "per procuration," is a notice to the indorsee that the party so accepting or indorsing professes to act under an authority from some principal, and imposes upon the indorsee the duty of ascertaining that the party so accepting or indorsing is acting within the terms of such authority. Therefore, in this case the plaintiff had distinct notice that the authority of the defendant's brother was limited, and ought to have made the requisite inquiry.—Secondly, the damages ought to be reduced to 68*l.* 8*s.* 9*d.*, the difference between the freight earned under the second charter, and that which would have been earned under the first. The plaintiff is not entitled to recover the 122*l.* 17*s.* claimed in his particulars, for demurrage can only be recovered where the ship is improperly detained by the charterer: here it was the fault of the shipowner that another cargo was not put on board. As the contract was broken, it was the captain's duty to have taken a cargo at the most he could get, so that the damages to be paid by the freighter should be reduced as much as possible: *Harries v. Edmonds* (b).

(a) 6 C. B. 766.

(b) 1 Car. &amp; K. 686.

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POLLOCK, C. B.—With respect to the application for a new trial, I am of opinion that the direction of my brother *Martin* was perfectly correct. I think that questions of this kind, whether arising on a charter-party, a bill of exchange, or any other commercial instrument, or on a verbal contract, should be decided on this principle—Has the party who is charged with liability under the instrument or contract authorized and permitted the person, who has professed to act as his agent, to act in such a manner and to such an extent that, from what has occurred publicly, the public in general would have a right to reasonably conclude, and persons dealing with him would naturally draw the inference, that he was a *general* agent? If so, in my judgment, the principal is bound, although, as between him and the agent, he takes care on every occasion to give special instructions; and I think it makes no difference whatever, whether the agent acts as if he were the principal, or professes to act as agent, as by signing “A. B., agent for C. D.” The expression “per procuration,” does not always necessarily mean that the act is done under procuration. All that it in reality means is this, “I am an agent not having any authority of my own.” *Alexander v. M'Kenzie* (a) was chiefly founded on the case of *Attwood v. Munnings* (b), where the agent was the defendant's wife, and no doubt the authority was quite special. It was not the authority which a tradesman gives to his shopman to sell goods during his absence, and possibly carry on his trade while he is abroad, but it was a particular authority to perform certain acts for certain specified objects; and the Court (particularly *Holroyd, J.*,) expressed itself with reference to that circumstance. It frequently happens that, where a judgment is delivered either by the Court or

(a) 6 C. B. 766.

(c) 7 B. & C. 278.

a judge, expressions are used which apply to a particular state of facts, and, in order to know what was decided, it is not sufficient merely to look at the judgment, but the facts and circumstances of the case must also be regarded. Now, in *Attwood v. Munnings*, *Holroyd, J.*, said, "I agree in thinking that the powers in question did not authorize this acceptance. The word '*procuration*' gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given." If a person professes to convey an estate as trustee, the party taking the conveyance from him is bound to ascertain that he had authority, as trustee, to convey it; but the same principle does not apply to commercial dealings. It would be most inconvenient if a person could not go into a shop and purchase an article without first asking the shopman whether he has authority to sell it. It may be that he was merely employed to sweep the shop; but it would be absurd to apply to the general business of life the doctrine as to the necessity of ascertaining whether an agent is acting within the scope of his authority—indeed the business of London could not go on. In *Attwood v. Munnings*, *Littledale, J.*, said: "I am of the same opinion. It is said that third persons are not bound to inquire into the making of a bill; but that is not so where the acceptance appears to be by *procuracion*." Therefore, if a person for the first time meets with a bill accepted "*per procuracion*," and chooses to take it without making any inquiry, the loss will fall on him if the acceptor had no authority. But the practical questions are,—what is the extent of inquiry which ought to be made? and what answers may be deemed satisfactory, so as to protect from loss, though it should turn out that the authority has been exceeded? It is true, that if a bill is accepted by A. on behalf of B., and it is known that B. has accepted bills for

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A., many persons would take it for granted that there was neither forgery nor fraud in the matter, and that they might safely take it; but if the law is complied with and an inquiry made, to what extent is it to go? I think that the holder is not bound to go to the acceptor and say, "Have you a power of attorney or other authority to accept this bill?" When he has ascertained that the person who has accepted the bill as agent or by procuration is a clerk in the house, and, in the course of his employment, has from day to day accepted bills of that sort, that is enough, and he need not ask for his power of attorney or authority, nor whether that particular bill is on account of the firm. When you find him in the house acting and recognised as the agent of the firm, you need not make any further inquiry; and yet it may turn out that he has never accepted a bill without a schedule being laid before him in the morning of all bills that were to be accepted by him on that day. Persons are supposed to carry on their business according to the ordinary arrangement of mankind generally. If a person conducts his business, as the defendant did, by an agent who acts in his absence, in my judgment it is a question for the jury whether, according to the ordinary mode in which business is carried on, the reasonable conclusion to be drawn from these circumstances is not that he had authority as a general agent; and, if so, the principal is bound, though it should turn out that he had limited the extent of the agency by certain rules and regulations. The cases cited by my brother *Shee* do not apply. If a man, by his conduct, holds out another as his agent,—by permitting him to act in that character and deal with the world as a general agent, he must be taken to be the general agent of the person for whom he so acts, and the latter is bound, though, in a particular instance, the agent may have exceeded his authority. It is so even in the case of a special agent;

as, for instance, if a man sends his servant to market to sell goods or a horse for a certain price, and the servant sells them for less, the master is bound by it. There, even the violation of a particular authority does not render the sale null and void. Upon these grounds, it appears to me that the direction of my brother *Martin* was in conformity with the law, and that the verdict was right; but, unless the parties come to some arrangement, there must be a new trial on the ground that the damages are not properly assessed.

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WATSON, B.—I am of the same opinion. It is important to commerce that the case should be put on its true ground, and I think that my brother *Martin* left it properly to the jury. The defendant formerly resided in Ireland and there carried on the business of a corn merchant. He purchased oats to a great extent and chartered numerous vessels to carry them for sale on this side of the water. Three years ago he came to reside in England and left his brother Martin M'Guire to conduct the business in Limerick. The name of M'Guire remained over the door of the warehouse, and Martin M'Guire had the sole conduct of the business as the representative of the defendant,—he bought oats and chartered ships for their conveyance to England. It was proved, on the part of the defendant, that he usually sent instructions to Martin M'Guire for every ship that was to be chartered, and also for the purchase of corn. Then, on these facts, the question is, how ought the matter to have been left to the jury? My brother *Martin* left to them, "Was Martin M'Guire the general agent of the defendant?" I do not know what other question could well be put. No person was there but Martin M'Guire; and it is to be observed that when he chartered the ships he never once shewed the shipowner his authority. If, every time he

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purchased oats or chartered a ship, he had said, "I have a letter from my brother, that is my authority, to purchase such a quantity of oats, or to charter a vessel of so many tons," the case might be different; but he invariably purchased the oats and chartered the ships without communicating to the vendors or shipowners any authority from the defendant to do so. Throughout, he acted generally in the purchase of oats and the chartering of ships, and that was cogent evidence for the jury that he was a general agent. The fact that he had special instructions in some cases is not inconsistent with that. A general agent at New York or in England has special instructions to buy certain goods or to charter a particular vessel, but he is nevertheless a general agent. The case of *Alexander v. Mackenzie* (a) is in conformity with my judgment. There the bill of exchange was indorsed by the manager after the stoppage of the bank, and the learned Judge left it to the jury to say whether he had a general authority to draw, accept, and indorse bills on account of the bank, and whether he indorsed the bill by the authority of the bank; for, if he had a general authority, that would bind the bank, and any private instructions would not affect that general authority. So, here, any private instructions to Martin M'Guire would not affect the person who trusted him, if there was a general authority. The judgment in *Alexander v. Mackenzie* proceeded on that ground. *Coltman, J.*, said:—"If this banking Company had been in the habit of allowing their cashier or manager to indorse bills on their behalf, that would have imported a general authority, and the public would not have been bound to inquire into the circumstances or the precise extent of such liability." *Maule, J.*, said:—"The whole course of business proved had reference to bills so accepted and indorsed only. The case is, therefore, removed out of that class of cases where the extent of the authority is to be

(a) 6 C. B. 766.

inferred from its exercise, and the mode of exercising it does not import any limitation of the authority." Therefore the very case cited by my brother *Shee* supports the view taken by the learned Judge at the trial. Then my brother *Shee* says:—"It is true there may have been an authority to charter a particular ship about to arrive at the port in Ireland, but this charter was an excess of authority." But all we find here is, that Martin M'Guire chartered as more than one-half the vessels in this country are chartered, viz, long before they arrive at the port of loading. It is said, that is a fraud between the agent of the defendant and the agent of the plaintiff. If so, that might have afforded a good defence under a plea of fraud. But there is no such plea on the record, and the only question is, whether the chartering this ship was beyond the scope of the agent's authority. There is nothing to lead to that conclusion.

Then as to the damages.—I think that my brother left that question properly to the jury: he left substantially, what would the vessel have earned if the charter had been fulfilled by the defendant, and then deduct from that what she did earn, deducting also the expenses. The amount given by the jury is not satisfactory, and my impression is that it is wrong. I cannot see any advantage in sending down the case for another trial, and the better course would be to consent to reduce the damages; but unless the parties agree the rule must be absolute for a new trial.

MARTIN, B.—The first question is a very important one, viz, what is the proper direction to the jury under the circumstances which I am about to mention? The defendant carried on business as a corn merchant at Limerick, and had exported oats to London largely. Three years before the transaction in question, in consequence of the death of

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his brother, he came to reside in London, and left the business in Limerick to be carried on by his brother Martin. The defendant's name was over the door, and it was generally known that the business was his and that his brother Martin was acting for him. During the present year he had bought upwards of 30,000 quarters of oats, and during three years he had chartered upwards of sixty ships, through the agency of his brother. In this state of things, Martin having been acting for upwards of three years, a ship, belonging to a person in London, was in Limerick, about to proceed to Quebec and bring home a cargo of timber. Thereupon the shipbrokers at Limerick negotiated the charter of the ship to bring a cargo of oats from Limerick to London on her return from Quebec. The charter-party was executed by Martin M'Guire "per procuration" of Thomas M'Guire; and the question is, what is the proper mode in which the case should be left to the jury? I am by no means certain that a person who employs an agent, in the way in which Martin M'Guire was employed, is not liable for every honest contract entered into by him for the purpose of the business in which he is engaged. The only question for the jury was whether this particular contract was fairly within the scope of his authority. Then, can it make any difference as to the mode in which the question is to be left to the jury, that on previous occasions Martin M'Guire had chartered the ships after he had received instructions from the defendant? In my judgment not the slightest. If a person is employed as a *general* agent, in the way Martin M'Guire was employed, so far as the public are concerned he is the person carrying on the business, and any private instructions given by the principal are quite immaterial. As to the procuration the matter is plain. It is true that Martin M'Guire was only the agent of the defendant, whose name was over the door, and he signed the charter

"per procuration;" but that was only saying the truth, that he was agent, and so acted by procuration. The case of *Alexander v. Mackenzie* is quite right under the circumstances. Every case of this kind must depend on the nature of the contract and the condition of the person who makes it. In my judgment Martin M'Guire was a general agent, and notwithstanding he had received on previous occasions special directions as to chartering ships, the defendant is bound by all contracts made by him in the ordinary way of trade within the scope of his authority as such agent.

With respect to the damages, I entertain the same opinion that I expressed at the trial. The proper mode of assessing them would be to take the damage actually proved. The plaintiff was compelled to give particulars of damage, and, as frequently happens in such case, he gave particulars of the damage which he had actually sustained, but which, when investigated, turned out not to be the legal damage arising from the breach of contract. In my judgment neither the 68*l.* 8*s.* 9*d.* or 122*l.* 17*s.* are correct items of damage. The real damage is the loss arising from the breach of contract? That is to be ascertained by calculation of the freight to be earned, and deduction of the expenses which the shipowner would be put to in earning it; and what the ship earned (if anything) during the period which would have been occupied in performing the voyage, ought also to be deducted. It may be doubtful whether a party who breaks a contract has a right to say "I will not pay you the damage arising from my breach of contract, because you ought to have done something for the purpose of relieving me." I am not prepared to say that a shipowner, who has lost his freight by reason of a breach of contract by the charterer, is bound to go and look for employment for his ship so as to relieve the charterer from the consequences. On that point however it is not necessary to give an opinion.

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The jury have found the damages as claimed by the plaintiff in his particulars. It would be better for both parties to agree as to the amount, each yielding something of what he supposes to be his rights for the purpose of ending the matter; if not, there must be a new trial.

Rule accordingly (a).

(a) The parties then agreed that the rule for a new trial should be discharged, the damages to be reduced to 100*l*. See *Oldershaw v. Holt*, 12 A. & E. 590.

May 29.

WICKS v. MACNAMARA and Others.

In an action for an injury to the plaintiff by the careless driving of a servant of the defendants, the Court refused to make an order for particulars of the injury sustained by the plaintiff.

*LUSH*, on behalf of the defendants, applied for a rule for particulars.—This was an action against the defendants for an injury to the plaintiff, who had been thrown out of his cart in consequence of a collision with an omnibus driven by a servant of the defendants. The affidavits stated that the defendants had no means of knowing what the injury done to the plaintiff was except from the declaration, which was not sufficient to enable them to form any estimate of opinion as to the alleged injury. *Channell*, B., at Chambers, had refused to make an order.

*Lush*, in support of his application (May 25).—The defendants have no means of knowing what is the plaintiff's case unless they get the information required. [*Bramwell*, B.—The defendants know who the plaintiff is, and the occasion on which he was injured. But it seems unfair to withhold the information sought. *Watson*, B.—Perhaps the plaintiff does not yet know the extent of the injury that he has sustained.]

*R. N. Philipps* shewed cause in the first instance.—The declaration in an action of this kind sufficiently discloses the nature of the plaintiff's demand. In *Stannard v. Ullithorne (a)*, which was an action on the case against an attorney, for negligence in transacting the assignment of a leasehold belonging to the plaintiff, by reason whereof the plaintiff had to pay damages to the assignee, the Court refused to order the delivery of particulars. [*Pollock, C. B.*—That case occurred many years ago: latterly the current of decision has been, that a plaintiff ought to give every information respecting his claim.]

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*Cur. adv. vult.*

*POLLOCK, C. B.*, now said.—There will be no rule. The practice has always been in accordance with the decision of my brother *Channell*. And unless there are grave reasons for departing from it, the practice should be adhered to; though no doubt there may be considerable inconvenience in not giving particulars in cases when a tort might resolve itself into a mere money claim.

*MARTIN, B.*—The case must not be understood as laying down any general rule. The Judge at Chambers has a discretion, and if in the present case he had made an order, perhaps we should not have interfered.

*BRAMWELL, B.*, and *WATSON, B.*, concurred.

Rule refused (*b*).

(a) 3 Bing. N. C. 326.

(b) See per *Martin, B.*, *Smith v. M'Guire*, *antè*, p. 567.

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STANDEVEN v. MURGATROYD.

After public notice that common jury causes in London would be taken on the 18th of February, on the 12th a fresh notice was issued that they would be taken on the 16th. A cause, in which the plaintiff, his attorney and witnesses, resided in the country at a great distance from London, having been put in the list for the 15th, was called on in its turn, and the witnesses not being in attendance was referred. The witnesses arrived in the evening after the Court had risen. The arbitrator having awarded in favour of the plaintiff:—*Held*, that, on taxation, the Master was at liberty to allow the plaintiff the costs of his witnesses as costs in the cause.

*MANISTY*, for the defendant, moved for a rule to shew cause why the Master should not review his taxation of the plaintiff's costs.

An arrangement had been made and notice issued that common jury causes, at the sittings in London after Hilary Term, would be taken on 18th of February. On the 12th of February, in consequence of the small number of special jury causes, a fresh notice was issued and posted up at the Associate's office, that common jury causes would be taken on Tuesday the 16th; and on the same day the defendant's agent in London wrote to the country attorney to that effect. On Monday the 15th the cause was in the list for the day. It was called on about 11 o'clock when the defendant and all his witnesses were ready; but the plaintiff's witnesses, who resided in Yorkshire, were not in attendance. The plaintiff's counsel applied to have the cause postponed. The learned Judge, *Martin*, B., ordered the cause to be placed at the bottom of the list for the day. In the afternoon the cause again came on in its order, but the plaintiff's witnesses had not arrived. The cause was then referred, the costs to abide the event, to an arbitrator, who ultimately made his award in favour of the plaintiff. The witnesses arrived in the evening after the Court rose. On taxation, the Master allowed as costs in the cause the expenses of these witnesses.

*Manisty*, in support of the application.—The plaintiff is not entitled to the expenses of witnesses who had not

*(Signature)*

MASTERS, L.—We do not mean to dissent from the view in the Court of Common Pleas which has been referred to, but under the circumstances of this case we think that the costs of these witnesses ought to be allowed. I should not have compelled the plaintiff to go on upon the 16th if an application had been made to me and the facts stated.

### Rule refinement.

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May 31.

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A covenant by a municipal corporation to repay money borrowed by them after the passing of the 5 & 6 Wm. 4, c. 76, is valid, although the money was not borrowed for any of the purposes to which the borough fund is applicable by the 92nd section of that Act; and although the covenant is contained in a mortgage deed made without the approbation of the Lords of the Treasury, as required by the 94th section.

**D**ECLARATION on a deed, whereby the defendants covenanted to pay the plaintiff 1500*l.* on the 4th of March, 1851.

**Plea.**—That the defendants are a body corporate and are the mayor, aldermen and burgesses of the borough of Brecon, being the borough of Brecon mentioned in the Schedule (A.) to a certain Act made and passed, &c., (5 & 6 Wm. 4, c. 76). That after the passing and coming into operation of the said Act, and before the making of the supposed deed, councillors under the provisions of the said Act were duly elected for the first time, and the said election was then duly declared; and thereupon then the mayor, aldermen and burgesses of the borough of Brecon, being the governing body of the body corporate named in conjunction with such borough in the said schedule, went out of office and their whole powers and duties ceased, pursuant to the said Act: that afterwards, and after the passing and coming into operation of the said Act, and before the making of the supposed deed, a treasurer of the said borough was duly elected according to the provisions of the said Act: that before and at the time of the making of the supposed deed, the defendants were and from thence hitherto have been a corporation within and subject to the provisions of the said Act, and not otherwise: that the supposed deed was made after the passing and coming into operation of an act of parliament made and passed, &c. (6 & 7 Wm. 4, c. 104), intituled “An Act for the better administration of the borough funds in certain boroughs;”

and after the passing and coming into operation of an act of parliament made and passed, &c. (7 Wm. 4 & 1 Vict. c. 78), intituled "An Act to amend and an Act for the regulation of municipal corporations in England and Wales:" that the supposed deed was not made or given to secure the payment of any lawful debt due from the said corporate body to any person or persons, body corporate or bodies corporate, contracted before the passing of the said first mentioned Act and unredeemed, or any part thereof; or the payment of any interest of such debt or any part thereof, or any part of such interest; nor was the supposed deed made or given in respect of any right, interest, claim or demand of any person or persons, or body corporate or bodies corporate, in or upon the real or personal estate of the mayor, aldermen and burgesses of the borough of Brecon, by virtue of any proceeding, either at law or in equity, which had been instituted before the passing of the first mentioned Act, or at any other time, or by virtue of any mortgage or otherwise: that the supposed deed was not given for, towards, or on account of the salary of any mayor, or of any recorder or police magistrate whatever; or for, towards, or on account of the salary of any town clerk or treasurer whatever, or of any other officer at any time appointed by the council of the said borough; or for, towards or on account of any payment of any expenses incurred at any time in preparing or printing any burgess lists, ward lists, election lists, or notices, or other matters attending such elections as are in the said first mentioned Act mentioned; or for, towards, or on account of any sum whatever paid or to be paid by the said borough to the treasurer of any county, as in the first mentioned Act or in any other Act in that behalf provided; or for, towards or on account of the expense of maintaining any borough gaol, house of correction, or corporate buildings whatever, or the

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payment of any police or other constables ; or of any other expenses incurred in carrying into effect the provisions of the first mentioned Act : that the supposed deed was not made or executed for securing repayment or satisfaction of any debt or obligation contracted by or on behalf of the said mayor, aldermen and burgesses of the borough of Brecon, before the passing of the said first mentioned Act ; nor was the said deed made or executed for securing repayment or satisfaction of any money borrowed by the council of the said borough for the purpose of being applied, or which was actually applied, in or towards the satisfaction or discharge of any such pre-existing debt or obligation : that the said supposed deed was not made with the approbation of the Lords Commissioners of her Majesty's Treasury, or of any three of them : that the defendants had not at the time of the making of the said supposed deed, nor have they had at any time since, nor have they now, any goods, chattels, real or personal estate, monies, property or effects of any nature or kind whatever subject or liable to execution in this action, or in any other action, upon the supposed covenant in the supposed deed in declaration mentioned : that the supposed deed and the supposed covenant of the defendants were and are void and of no effect.

The plaintiff demurred to the plea ; and also rejoined setting out the deed verbatim.—The deed recited the 1 Vict. c. xii., intituled “An Act for providing market places, and for regulating the markets within the borough of Brecon in the county of Brecon ;” and the provisions thereof empowering the defendants, for the purposes of that Act, to sell, alienate and mortgage any messuages or tenements, lands or hereditaments vested in them : also reciting that 1,500*l.* had been lent by the plaintiff to the defendants for the purposes of the Act : it was witnessed that the defendants, in pursuance of the powers contained in the

Act, conveyed to the plaintiff by way of mortgage certain houses, purchased by them under the provisions of the Act, as a security for repayment of the 1,500*l.* and interest. The deed contained the covenant declared on.

Rejoinder.—That the deed was not made with the approbation or consent of the Lords Commissioners of her Majesty's Treasury, or any three of them.

Demurrer and joinder therein.

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*Phipson*, for the plaintiff.—First, the plea is bad. The covenant would be clearly good at common law, and there is no provision in the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, which renders it void. The 92nd section of that Act specifies the purposes to which the borough fund is to be appropriated, and the plea negatives the fact of the deed having been given for a debt contracted for any of those purposes. But in *Pallister v. The Mayor of Gravesend* (a) a similar plea was held bad. There the bond was given by the corporation after the passing of the 5 & 6 Wm. 4, c. 76, but before the passing of the 6 & 7 Wm. 4, c. 104, to secure a sum of money borrowed for the purpose of paying debts contracted by the corporation before the passing of the first mentioned Act, and it was held that the bond was valid, although there might be difficulty in enforcing a judgment upon it. The 6 & 7 Wm. 4, c. 104, s. 1, has enabled corporations to give new securities for debts contracted before the 5 & 6 Wm. 4, c. 76; and the 7 Wm. 4 & 1 Vict. c. 78, s. 28, declares that money borrowed and applied in satisfaction and discharge of any pre-existing debt shall be deemed, within the meaning of the 6 & 7 Wm. 4, c. 104, a debt contracted before the passing of the 5 & 6 Wm. 4, c. 76. In *Holdsworth v. The Mayor of Dartmouth* (b), the bond was given by the corporation, before the passing of the 5 & 6 Wm. 4, c. 76, by way of reimburse-

(a) 9 C. B. 774.

(b) 11 A. & E. 490.



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ment for costs incurred by a corporation in defending certain quo warranto informations, and it was held that, being good at common law, it was not invalidated by that Act. In *Nowell v. The Mayor, &c., of Worcester (a)*, it was held that a local board of health, constituted under the 11 & 12 Vict. c. 63, was liable on their covenant to pay a sum of money, although the 140th section provides that any expense incurred by the board shall be paid out of the rates. *Kendall v. King (b)* is also an authority that an action may be maintained against a corporation on their deed, notwithstanding the plaintiff may have no means of enforcing the judgment.—Secondly, the rejoinder is clearly bad. The 1 Vict. c. xii., s. 32(c), enables the corporation to borrow money for the purposes of the Act. Section 83(d) prohibits the corporation from mortgaging, without the approbation of

(a) 9 Exch. 457.

(b) 17 C. B. 483.

(c) Section 32 enacts,—“That it shall be lawful for the said mayor, aldermen and burgesses, and they are hereby empowered to raise or borrow from any person any sum of money which they may think necessary towards carrying into effect the purposes of this Act, on mortgage of any messuages or tenements, lands or hereditaments vested in or belonging to the said mayor, aldermen and burgesses or any part or parts thereof, or for such purposes absolutely to sell, convey and dispose of any messuages, lands or hereditaments belonging to them as aforesaid, and which said sum shall be applied to the purposes of this Act, and to no other use or purpose whatsoever; and any such mortgage or other security, sale or disposition of any such messuages or tenements, lands or

hereditaments may be made in the forms herein specified for such like purposes, so far as the circumstances of the case will admit thereof.”

(d) Section 83:—“Provided always, and it is hereby enacted, that nothing in this Act contained shall extend or be construed to extend to enable the mayor, aldermen and burgesses of the said borough of Brecon to appropriate, use, sell, demise, mortgage or alienate for the purposes of this Act, without the approbation of the Lords Commissioners of her Majesty’s Treasury, or any three of them, any messuages, lands, tenements or hereditaments which they could not have taken, appropriated, used, sold, demised, mortgaged or alienated without such approbation before the passing of this Act, anything in this Act to the contrary notwithstanding.”

the Lords of the Treasury, any land which they could not have mortgaged without such approbation before the passing of that Act. The replication shews that this is not a mortgage of land which the corporation held before the passing of that Act, but of land bought under the provisions and for the purposes of that Act, and therefore the 83rd section does not apply. But, whether the mortgage is good or bad, the covenant to pay the money is good.

The Court then called on

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*Welsby*, for the defendants.—This is property which the corporation had no power to mortgage without the approbation of the Lords of the Treasury, and, the mortgage deed being void, the covenant cannot be enforced. It is conceded that the effect of the 83rd section of the 1 Vict. c. xii., is to place mortgages made without the approbation of the Lords of the Treasury in the same situation as if there was no power to mortgage under that Act; therefore the question depends on the 94th section of the Municipal Corporation Act, which also prohibits any mortgage without the approbation of the Lords of the Treasury. *Pallister v. The Mayor of Gravesend* (a) was the case of a bond which it was admitted would have been valid before the Municipal Corporation Act, and the question was whether there was anything in that Act to render it void. The Act contains no provision as to bonds, but only as to mortgages. [*Pollock*, C. B.—Suppose a trustee borrowed money on the security of property which he had no power to mortgage, might not the covenant for repayment be enforced?] There the deed would be valid as against him and persons claiming under him. [*Watson*, B.—Though a bill of sale for transferring the property in a ship by way of mortgage may be void, as such, for want of reciting in it the certificate of registry,

(a) 9 C. B. 774.

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as required by the 26 Geo. 3, c. 60, s. 17, yet the mortgagor may be sued on his personal covenant contained in the same instrument for the repayment of the money lent: *Kerrison v. Cole (a)*.] This is a deed which it was not lawful for the corporation to make, for it is prohibited by statute. It differs from the deed of an individual, because a judgment on the covenant can only be enforced against the corporate property. *Nowell v. The Mayor of Worcester (b)* proceeded on the ground that the matters mentioned in the statute were directory only with respect to contracts entered into by the board and third parties, and therefore that the contract was binding although the preliminaries had not been complied with. Here, inasmuch as a mortgage without the approbation of the Lords of the Treasury is absolutely prohibited, the deed and covenant are void.

*Phipson* replied.

POLLOCK, C. B.—I am of opinion that the deed is valid so far as regards the covenant for the repayment of the money borrowed. There must therefore be judgment for the plaintiff.

MARTIN, B.—I am also of opinion that the plaintiff is entitled to judgment. It seems to me that the law is properly laid down by *Parke, B.*, in the case of *The South Yorkshire Railway Company v. The Great Northern Railway Company (c)*, where he says—"Generally speaking all corporations are bound by a covenant under their corporate seal, properly affixed, which is the legal mode of expressing the will of the entire body, and are bound as much as an individual is by his own deed. \* \* \* But where a

(a) 8 East, 231.

(b) 9 Exch. 457.

(c) 9 Exch. 55, 84.

corporation is created by an act of parliament *for particular purposes*, with special powers, then, indeed, another question arises; their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*—that is, that the legislature meant that such a deed should not be made.” Therefore, in order to avoid this covenant, it must appear that it was a covenant which the corporation were forbidden by statute to enter into. Then, is there anything in the Municipal Corporation Act which prohibits a corporation from entering into a covenant to pay its lawful debts? It is argued that the 94th section renders this covenant void. But that section only says that it shall not be lawful to mortgage any lands of the corporation, except with the approbation of the Lords of the Treasury, which was not obtained in this case; and although the mortgage may be invalid, that is no reason why the corporation should not be liable on their covenant to repay the mortgage money.

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BRAMWELL, B.—I also am of opinion that the plaintiff is entitled to judgment. If the case of *Pallister v. The Mayor of Gravesend* is good law; a simple covenant by the corporation to repay money is not void, because the money was borrowed for purposes other than those to which the borough fund is applicable. The question then is, whether this covenant is invalidated because it is contained in a deed by which the corporation do something which it is alleged they were not legally competent to do. In my opinion, if the security by way of mortgage was unlawful, the whole deed would be void; since, though an instrument void in part, at common law, may be good for the other part, yet if void by statute it is altogether void; according

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to the old saying, "that the statute is like a tyrant, when he comes he makes all void, but the common law is like a nursing father, makes void only that part where the fault is and preserves the rest" (a). Then does the Municipal Corporation Act absolutely prohibit a contract by way of mortgage? The 94th section says, that it "shall not be lawful" for the corporation to mortgage any of their lands without the consent of the Lords of the Treasury. That only means that they shall not be entitled to do so. Then the case of *Kerrison v. Cole* (b) is an authority for holding that this covenant is good.

WATSON, B.—I am also of opinion that the plaintiff is entitled to judgment. There is nothing in the Municipal Corporation Act to prevent a corporation from entering into a covenant to repay money borrowed on mortgage. The Act says that it shall not be lawful for a corporation—that is they shall not have the power—to mortgage their property without the approbation of the Lords of the Treasury; and the question is, whether the covenant to repay the mortgage money is collateral to or dependent on the mortgage. I think it is purely collateral. It is not like a covenant in a lease which is dependent on the lease. The language of the 13 Eliz. c. 20, is stronger than that of the statute in question. It says that all chargings of benefices "shall be utterly void." And it was held by Lord *Kenyon* in *Mouys v. Leake* (c), that though a grant of a rent charge by a rector out of his benefice was void under that Act, yet the covenant in the deed of grant, to pay the rent charge, was valid. Again, the 26 Geo. 3, c. 60, s. 17, required

(a) Per *Hobart*, C. J., in *Norton v. Simmes*, Hob. 14 (see *Ma-leverer v. Redshaw*, 1 Mod. 36), adopted by *Wilmot*, C. J., in *Col-*

*lins v. Blantern*, 2 Wils. 347.

(b) 8 East, 231.

(c) 8 T. R. 411.

that, upon the transfer of property in a ship, the certificate of registry should be recited in the bill of sale, "otherwise such bill of sale shall be utterly null and void to all intents and purposes;" but it was held by Lord *Ellenborough* in *Kerri-son v. Cole* (*b*), that though a mortgage of a ship was void under that statute, yet a covenant in the same instrument for payment of the mortgage money was good. Those cases are founded on good sense and are sound law, and it would be mischievous to disturb them.

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Judgment for the plaintiff.

(a) 8 East, 231.

#### KIDSON v. TURNER.

June 7.

**D**EBT on bond in the penal sum of 600*l.*, conditioned for payment of 300*l.* by instalments.

Plea.—That before the passing of the "Bankrupt Law Consolidation Act, 1849," the defendant being then a trader, dealer and chapman, subject to the statutes then in force concerning bankrupts, became and was a bankrupt within the true intent and meaning of the last mentioned statutes; and a fiat of bankruptcy was duly issued against the defendant; and such proceedings were thereupon had, that afterwards and before the passing of the first mentioned Act, the defendant obtained his certificate of conformity to the laws then in force concerning bankrupts, and all things were done and happened necessary to discharge the defendant by virtue of the said certificate, from (amongst other things) the debt, claim or demand of the plaintiff next

A bond is a "contract, promise or agreement" within the meaning of the 204th section of the "Bankrupt Law Consolidation Act, 1849," and therefore a bond, given by a bankrupt for payment of a debt barred by his certificate, is void.

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hereinafter mentioned. And defendant says that before, and at the time when he became and was a bankrupt as aforesaid, he was indebted to the plaintiff in a large sum of money, to wit 300*l.*, which was then a debt, claim or demand proveable under the said bankruptcy and was proved by the plaintiff thereunder accordingly; and the defendant was then and before the passing of the "Bankrupt Law Consolidation Act, 1849," discharged by virtue of such certificate from the said debt, claim or demand. And the defendant further says, that afterwards and after the issuing of the said fiat, and after he had obtained his said certificate as aforesaid, and after the "Bankrupt Law Consolidation Act, 1849," commenced and took effect, that is to say, on the 10th day of September, A. D. 1852, the defendant at the request of the plaintiff made and executed the writing obligatory in the declaration mentioned for securing to the plaintiff payment by the defendant of the said debt, claim or demand of the plaintiff, from which the defendant had been and was so discharged as aforesaid, and upon and for no other consideration whatever; and the said writing obligatory is a contract to pay or satisfy the said debt, claim or demand.

Demurrer and joinder therein.

*Montague Smith* (*Gray* with him), in support of the demurrer.—The question is whether an action can be maintained on a bond given by a bankrupt after the passing of the "Bankrupt Law Consolidation Act, 1849," (12 & 13 Vict. c. 106), in consideration of a debt from which he has been discharged by virtue of his certificate under the former bankrupt Acts. The 204th section of the "Bankrupt Law Consolidation Act, 1849," enacts "That no bankrupt after his certificate shall have been allowed, shall be liable to pay or satisfy any debt, claim or

demand from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim or demand, upon any *contract, promise or agreement* made after the issuing of the fiat or filing of the petition for adjudication of bankruptcy; and if any bankrupt be sued upon any such contract, promise or agreement, he may plead the general issue, and give this Act and the special matter in evidence." That enactment protects a bankrupt from being sued on a new promise in consideration of a debt from which he has been discharged; but it does not apply to a bond, since a bond requires no consideration to support it. Formerly, a debt, though barred by a certificate in bankruptcy, was a sufficient consideration for a new promise to pay it: *Kirkpatrick v. Tattersal* (a). The 131st section of the 6 Geo. 4, c. 16, required the promise to be in writing signed by the bankrupt, or some other person authorized in writing by him. The only effect of the 204th section of the "Bankrupt Law Consolidation Act, 1849," is to place promises in writing in the same position as verbal promises after the 6 Geo. 4, c. 16, s. 131. A bond creates an entirely new debt, and is not comprehended in the words "contract, promise or agreement." It would be a singular anomaly if a bankrupt, after his certificate, might bind himself to pay a sum of money by a voluntary bond founded on no consideration whatever, and yet if he gave the bond from an honourable motive, viz. to pay a just debt which his creditor could not enforce, such a bond would be void. [*Pollock*, C. B.—A bankrupt may, if he like, pay a debt barred by his certificate, but he cannot put himself under an obligation to pay it. *Bramwell*, B., referred to *Ambrose v. Cook* (b).] The 202nd section of the Bankrupt Law Consolidation Act,

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(a) 13 M. & W. 766; and see 1 Bing. 281; *Penn v. Bennet*,  
*Blackbourn v. Ogle*, 8 Price, 526; 4 Camp. 205.  
*Briz v. Braham*, 8 Moore, 261; (b) 2 H. & N. 73.



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1849, which makes void contracts by a bankrupt to induce any creditor to forbear opposition, uses the words "contract or security." The latter part of the 204th section of that Act shews that the legislature did not intend to include bonds, for it provides that if a "bankrupt be sued on any such contract, promise or agreement, he may plead the general issue." In an action on a bond there is no general issue.

*Hannen*, in support of the plea.—If the argument for the plaintiff were well founded, it would follow that a promise to pay the old debt would be valid where there was a new consideration for it. But the authorities have established that a new consideration does not make the promise binding: *Evans v. Williams* (a), per *Bramwell*, B., in *Ambrose v. Cook* (b), *Sheerman v. Thompson* (c). A bond is equally within the mischief which the legislature intended to prevent, as a "contract, promise or agreement." The object of the enactment was to free bankrupts from all liability to pay debts discharged by their certificate. Before the 6 Geo. 4, c. 16, a bankrupt was liable on any new promise, whether verbal or in writing, or under seal. That statute required the promise to be in writing. The "Bankrupt Law Consolidation Act, 1849," goes further, and discharges the bankrupt from liability in respect of any promise whatever. That a bond is a contract is clear from the definition of a deed in Co. Litt. 35 (b). In *Hill v. Carr* (d), it was said—"Covenant will lie on a bond, for it proves an agreement." Also in *Parks v. Wilson* (e), Lord *Parker* C., said:—"The authorities are many in this Court, that bonds have been considered as evidences of agreements, and obligors held to

(a) 1 C. &amp; M. 30.

(d) 1 Cases in Chan. 294.

(b) 2 H. &amp; N. 73.

(e) 10 Mod. 516.

(c) 11 A. &amp; E. 1027.

specific performance and not allowed to forfeit the penalty." The 202nd section, which uses the word "security," avoids contracts made by a bankrupt "*or any other person*;" the 204th section mentions contracts by a bankrupt only. With respect to the argument derived from the leave to plead the general issue, that would apply equally to a bill of exchange, which is clearly a "contract or promise" within the statute.—He also referred to *Taylor v. Wilson* (a).

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*Montague Smith* replied.

POLLOCK, C. B.—I am of opinion that the plea is good. The action is on a bond, and the defendant sets up as a defence the 204th section of the "Bankrupt Law Consolidation Act, 1849," saying in substance "I was a bankrupt and got my certificate of conformity before that Act passed, and after it passed I gave this bond as a security for a debt from which I was discharged under my bankruptcy." No doubt, the object of the legislature in passing this enactment was that there should be perfect uniformity in the position of persons who obtained their certificates,—that they should neither be subject to the pressure of old creditors with old securities, nor to the importunity of old creditors craving new securities. The objections to the plea are twofold: one is, that the 204th section does not apply to bonds, because it allows the bankrupt to plead the general issue and give the special matter in evidence. I have always understood that the plea of "non est factum" to an action on a bond is similar to a plea of non assumpsit in an action on a promise; in the latter case it is "I never made the promise," and in the former, "I never made the bond." It is true that the plea of non assumpsit is a technical traverse of the promise alleged in the declaration

(a) 5 Exch. 251.

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when that promise is not the actual promise; and in that sense it differs from the plea of non est factum; but for this purpose it may not inappropriately be considered as a general issue. 'Then it is said that a bond is not comprehended in the words "any contract, promise or agreement." I am of opinion that it is. It would be strange if the legislature had said "You shall not make a new contract, promise or agreement, but you may give a bond." The argument founded on the fact that the 6 Geo. 4, c. 16, s. 131, required the promise to be in writing cannot prevail. The policy of the legislature, for a long period of years, has been to make a comprehensive system by which all bankrupts should be placed in the same situation. Our judgment must therefore be for the defendant.

BRAMWELL, B.—I am of the same opinion. The doubt which I entertained arose from this,—that a person may give a bond to another without any consideration whatever, yet, if he has the moral inducement to secure a debt from which he has been discharged under the bankrupt law, the bond is void. It may be, that sound policy requires that the latter sort of bond should not be capable of being enforced. At all events it is not so unreasonable as to justify us doing violence to the words of the Act, if the Act comprehends bonds. That reduces the question to this, is a bond a contract, or a promise, or an agreement within the meaning of the 204th section of the "Bankrupt Law Consolidation Act, 1849." I think that it is a contract or agreement. It has been urged that the intention was only to make void a new contract to pay an old debt, but that argument is done away with by the case of *Evans v. Williams*. With respect to the permission to plead the general issue; assuming that this is not a case in which the general issue could be pleaded, that is no reason for holding

that it is not within the statute, for the only effect of the permission to plead the general issue is to afford a more secure defence in cases where it is available. But I am by no means certain that the plea of "non est factum" to an action on a bond is not the general issue, like "non assumpsit" to an action on promises.

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WATSON, B.—I am also of opinion that the defendant is entitled to judgment. The word "contract" in the 204th section will embrace all contracts whether under seal or not. The intention was that a bankrupt should be freed from liability to pay the debts from which he is discharged by his certificate. It is argued that the enactment applies only to contracts which require some consideration to support them. But before the statute a promise or agreement to pay an old debt required no consideration, and the contract was valid whether under seal or not. Suppose that, instead of giving a bond, the defendant had covenanted to pay the old debt by a deed which recited his bankruptcy, that would be a contract within the mischief which the statute meant to obviate. Then suppose there was no recital, the covenant would still be within the Act; and if a covenant to pay an old debt is void, why should not a bond be void? It is said that the provision as to pleading the general issue shews that the 204th section does not apply to bonds, but there is the same provision in the 202nd section, and it is clear that a bond is a "contract or security" within the meaning of that section. Both sections have the same object; and the word "contract" is used in its ordinary acceptation, viz. "agreement," whether under seal or by parol.

Judgment for the defendant.

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June 7.

THE SOLVENCY MUTUAL GUARANTEE COMPANY v.  
YORK and Another.

A declaration stated, that by an agreement between the plaintiffs, a guarantee Company, and the defendants: after reciting that the defendants had delivered to the Company a declaration in writing containing a statement of the amount

of their business and losses thereon during the three years preceding, and that they were desirous of being guaranteed by the Company in respect of their future annual sales in their business, according to the deed of settlement of the Company and the rules and bye-laws thereof, and that the Company had agreed to enter into the guarantee thereafter contained upon the terms thereafter mentioned: It was agreed between the defendants and the Company, that if the defendants should pay the sums thereafter mentioned, and should comply with the provisions of the deed of settlement, &c., the subscribed funds of the Company should be liable to pay the defendants nine-tenths of their losses in respect of goods sold by them during the term of three years and one month from the 1st of December 1853, unto the 31st of December 1856, and during any further period the defendants should contribute to the funds of the Company and the Company should consent to receive further payments: but subject always to the provisions contained in the deed of settlement, &c., and also to the provisions thereafter contained and indorsed thereon. That one of the provisions indorsed by the plaintiffs on the agreement was, that every guarantee upon gross annual returns should, from the expiration of the original term, be treated as a renewed contract, unless either the member interested therein, or the board of directors, should give two calendar months' notice of an intention not to renew the same.—The declaration then alleged that the defendants agreed to pay the Company 43*l.* 15*s.* in each year during the term of the guarantee: that the agreement so made was a guarantee upon gross annual returns within the meaning of the provision indorsed on the policy, and that no notice of an intention not to renew the guarantee had been given by either party; and alleged as a breach the nonpayment of an instalment of 43*l.* 15*s.*, being the annual premium for the year 1857, and 10*l.* 18*s.* 9*d.*, an instalment for the year 1858.—Pleas: first, that the sums are claimed in respect of periods after the 31st December, 1856, and that from and after such date the defendants refused to contribute to the funds of the Company. Secondly: that on the 31st December, 1856, by agreement between the plaintiffs and another Company, the plaintiffs' Company became dissolved and were amalgamated with that other Company, and the business, funds and property of the plaintiffs' Company were transferred to that other Company. Thirdly: for defence on equitable grounds, a plea stating an agreement to amalgamate, as in the second plea.

*Held*, that the first plea was bad, for the stipulation for notice was part of the contract; and no notice having been given the agreement continued for another three years.

Also, that the second and third pleas were bad; since it did not appear that the Company were not empowered by their deed of settlement to amalgamate.

the defendants were desirous of being guaranteed by the Company in respect of their future annual sales in their business, according to the terms of the deed of settlement of the Company and the rules and bye-laws thereof; and that the Company had agreed to enter into the guarantee thereafter contained upon the terms thereafter mentioned; and that the defendants had contributed to the funds of the Company the sum of 10*l.* 0*s.* 10*d.*, and had further agreed to pay to the Company such further sums as were thereafter mentioned: It was thereby agreed by and between the defendants and the Company in manner following (that is to say), that if the defendants should pay to the Company the sums thereafter mentioned, and should fully comply with the provisions of the said deed of settlement and the rules and bye-laws for the time being of the Company; and further, that if the total amount of the sales made by the defendants in any, or in any one, of the years in which the guarantee was thereafter made to extend, should not exceed 25,000*l.*, then and in such case the subscribed funds of the Company should, according to the provisions of the said deed of settlement, rules, and bye-laws, be subject and liable to pay to the defendants nine-tenths of the loss or damage to be occasioned to the defendants in respect of any goods sold by the defendants during the term of three years and one month from the 1st of December 1853 unto the 31st December 1856, by reason of any or any one of the purchasers of such goods being duly found and declared bankrupt or taking the benefit of any Act for the relief of insolvent debtors, &c., within such time as aforesaid and during any further period in respect whereof the said member should contribute to the funds of the Company and the Company should consent to receive further payments at the rate aforesaid: but subject always to the provisions contained in the deed of settlement, rules

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and bye-laws, and also to the provisions thereafter contained and indorsed thereon. That one of the provisions indorsed by the plaintiffs on the agreement, before and at the time the same was so made by the defendants, was and is that every guarantee upon gross annual returns, floating risks, &c., whatever might be the original term of the same, should, from the expiration of such original term, be treated as a renewed contract of the like nature and conditions, unless either the member interested therein or the board of directors should give two calendar months notice of an intention not to renew the same. And the defendants did thereby agree with the Company, in consideration of the said guarantee, to pay the Company the further sum of 37*l.* 7*s.* 1*d.*, being the remainder of the annual consideration payable thereon up to the 31st December, 1854; and also the sum of 43*l.* 15*s.* in each and every succeeding year during the term of the said guarantee at the times and in the amounts thereafter mentioned (that is to say), at such time or times as the directors of the Company should appoint by any notice to be left at the place of business of the defendant fourteen days before the time appointed. That the agreement of guarantee so made and entered into between the plaintiffs and defendants was and is a guarantee upon gross annual returns within the meaning of the said provision so indorsed upon the said policy, and that no notice of an intention not to renew the said guarantee at the expiration of the period of three years and one month has ever been given by the board of directors to the defendants, or by the defendants to the board of directors.—The declaration then averred that the plaintiffs gave to the defendants fourteen days notice to pay certain instalments of the sum of 43*l.* 15*s.*, being the annual premium for the year 1857, and 10*l.* 18*s.* 9*d.*, an instalment for the year 1858.—Breach: nonpayment.

**Pleas.**—First, that the sums accrued due and are claimed in respect of periods after the 31st of December, 1856; and that from and after such date the defendants ceased to contribute, and wholly refused to contribute to the funds of the Company; of which the plaintiffs had notice.

Secondly.—That the sums accrued due and are claimed in respect of periods after the 31st day of December, 1856; and that on such last mentioned day, without the knowledge or consent of the defendants, by mutual agreement between the plaintiffs and a certain Company duly incorporated and called “The Mercantile Guarantee and Assurance Company,” and which said last mentioned Company was composed of and consisted of other and different members than “The Solvency Mutual Guarantee Company,” the Solvency Mutual Guarantee Company became and was then dissolved, and the members thereof became and were amalgamated into, and became and were members of the “Mercantile Guarantee and Assurance Company,” and the business, funds and property of the Solvency Mutual Guarantee Company were transferred to the Mercantile Guarantee and Assurance Company.

Thirdly.—For a defence on equitable grounds: a plea stating that before and at the 31st of December, 1856, it had been *agreed* between the plaintiffs and “The Mercantile Guarantee and Assurance Company,” &c. (as in the second plea mentioned).

Demurrers to pleas, and joinders therein.

*Turner*, in support of the demurrers.—The first plea confesses the breach, without raising any defence. It admits that no notice was given by either party of an intention not to renew the contract, and simply states that the premiums accrued due and are claimed in respect of periods after the expiration of the three years. But no notice

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having been given, the contract became renewed for the next three years. It is consistent with every allegation in the plea that during the periods therein mentioned, the defendants received from the plaintiffs the guaranteed amount for their losses.—The second plea affords no defence. Although the business, funds and property of the plaintiffs were transferred to another Company, it does not follow that they cannot pay the claims upon them. The transfer may enable them to do so. Either the deed of settlement provides for such a transfer, or it does not: if it does, the transfer was properly made; if it does not, it was ultra vires and void: *King v. The Accumulative Life Fund and General Assurance Company (a)*.—The third plea is also bad. It attempts to set up a defence on equitable grounds; but if the matter stated in the second plea affords no defence, the third cannot be good. Even if the second is good, the mere agreement to do what is stated in that plea to have been carried into effect, is no equitable ground of defence. The third plea is founded on the fallacy, that in equity a mere agreement is equivalent to performance. But assuming that there was such an agreement as that stated in the plea, it might never be carried into effect.

*Brett*, in support of the pleas.—The first plea is good. There is no contract binding the defendants to pay the premiums after the expiration of the first three years. The Company are under no obligation whatever, unless the premiums are paid. The policy is granted for three years and one month, and “during any further period in respect whereof the defendants should contribute to the funds of the Company and the Company should consent to receive further payments.” That implies the agreement of both parties in order to constitute a new contract. The con-

(a) 3 C. B., N. S., 151.

tract is subject to the provisions indorsed on the policy, one of which is, that every guarantee may be treated as a renewed contract of the like nature and condition, unless either party gives notice of his intention not to renew the same. But it does not say that the renewed contract is to be on the same terms; and therefore there may be no claim to the premiums mentioned in the plea. The indorsement is inconsistent with and contradictory to the agreement stated in the policy, and therefore the policy is the true contract between the parties and the indorsement void.—The second plea shews that the Company have put it out of their power to perform their part of the agreement, and therefore cannot hold the defendants liable to perform theirs. It states that they were dissolved, and their business, funds and property transferred to another Company.—The third plea affords a good equitable defence. A Court of equity would enforce the agreement by a decree for specific performance.

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*Turner* replied.

POLLOCK, C. B.—I am of opinion that our judgment ought to be for the plaintiffs. The first plea in effect says that the contract was at an end. I think that is not so. The stipulation for notice is incorporated with the contract, and as no notice was given by either party of their intention to determine it, it continued for another three years. The second and third pleas are also bad.

BRAMWELL, B.—I am of the same opinion. With respect to the first plea, I am not sure that in the absence of any notice the contract is not renewed for three years *and one month*. But, whether that is so or not, it is certainly renewed for the three years. Then, as to the second plea, it might seem a hardship that a member should be compelled

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to pay premiums to the Company—at the same time that it has ceased to exist as such—whether lawfully or not. But it does not appear that by the amalgamation the Company has disabled itself from paying the defendants the guaranteed sums. It may be that they have added a new business to their former one, and are more competent to pay. The third plea is worse than the second.

WATSON, B.—I am of the same opinion. The first plea is clearly bad. As to the others, if the Company have a right under their deed of settlement to unite with another Company they were justified in doing so; if they had no power, the amalgamation is of no effect.

Judgment for the plaintiffs.

June 9.

In the Matter of the Estate and Effects of EDWARD  
 STEER, Deceased.

A testator, a British born subject, resided for many years at Hamburg under circumstances which afforded evidence of a domicile there. He came for a temporary purpose to England, where he made a will, in which he declared that it was not his intention

THIS was a rule calling on Frances Dawson, executrix of Edward Steer deceased, to shew cause why she should not deliver to the Commissioners of Inland Revenue an account upon oath of all the legacies and of the property of Edward Steer deceased, respectively paid or to be paid or administered by her as such executrix; and why the duties thereon have not been paid or should not forthwith be paid.

The will of the testator, which was made in England on the 25th September, 1849, commenced as follows:—"This is the last will and testament of me Edward Steer, late of to renounce his domicile of origin as an Englishman. He returned to Hamburg where he died, having also made a will there:—*Held*, that the testator's declaration of intention could not prevail against the foreign domicile; and therefore that his personal property was not subject to legacy duty in England.

Wakefield in the county of York, and also of the city of Hamburg, merchant. Whereas, although I am now in England, my residence recently has been in Hamburg, of which, for the purpose of enabling me to trade, I was constituted a burgher, and my intention is to return there; but I do not mean by such declaration of intention to renounce my domicile of origin as an Englishman."

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The affidavit of the executrix, in answer to the application, stated the following facts, which were admitted:— The testator was a natural born Englishman; and was brought up in England; and, for some time before and up to the year 1819, was in partnership with W. Steer and R. Allott, at Wakefield in the county of York, as merchants. The partnership continued until the year 1826. Up to the year 1816, the testator rented a house at Wakefield, but for some years before the year 1816 he resided principally at Hamburg, as the resident foreign partner in the house of Steer and Allott. Before the year 1816, the testator had been regularly constituted a burgher of the city of Hamburg, for the purpose of enabling him to carry on business as a merchant there; it being necessary, according to the laws of Hamburg, that a person carrying on business there as a merchant should be constituted a burgher of the city. Up to the year 1816, the testator occasionally visited England in the course of his business as a merchant, and at those times generally resided at the house at Wakefield which he rented; but in the year 1816 he entirely gave up that house, and when he did so contemplated going to reside permanently at Hamburg. The testator, for some years before the death of the said W. Steer, carried on business at Hamburg as a merchant on his own account, besides carrying on business as one of the firm of Steer and Allott, and he continued to do so up to the time of the dissolution of the partnership in December,

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1826, when he carried on business at Hamburg solely on his own account. Before and in the year 1816 and for some years after the year 1826, the testator lived in Hamburg in lodgings, and he continued to reside in lodgings until he purchased a house. The testator carried on business at Hamburg until the year 1835, when he retired. Some years before, the testator purchased houses and lands at Hamburg, and, amongst other property, a house at Ham in the territory of Hamburg, which he furnished and in which he constantly resided, and some land near the house, which he laid out as a garden and pleasure ground; and he expended annually large sums in keeping up his gardens and pleasure grounds, and in erecting and keeping up hot-houses and green-houses therein; and he employed numerous servants, gardeners and labourers about his house, gardens and pleasure grounds. After the testator gave up business in the year 1835, he continued to reside at the house at Ham (except for such times as he was absent for short periods on visits to England) down to the time of his death, which occurred on the 30th of December, 1855, at his house at Ham, in the 82nd year of his age. For about forty years before his death, that is from the year 1816, when he gave up his house at Wakefield, the testator had resided at Hamburg, which was always during that time considered to be his home by all his relations and friends, and during all that period he had no house or residence or any landed property in England. For many years prior to the year 1849, the testator was in the habit of coming to England, generally once a year, for a month or two at the time, for the purpose of visiting his relations and friends in this country; and for the purpose of transacting business connected with matters in which he was concerned as trustee and for other like purposes, and on such occasions he stayed at the houses of the friends or

relations, or at hotels and in temporary lodgings.—The affidavit also stated that legacy duty on the testator's personal estate was claimed by the Court of Revenue of Hamburgh from the executors of a will made by him in Hamburgh, and that a decree had been made by the tribunals of that country for its payment, on the ground that he was domiciled there.

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*Bovill* and *Karslake*, for the executrix, shewed cause upon the above affidavit.—The law of the domicile of a testator or intestate decides whether his personal property is subject to legacy duty: *Thomson v. The Advocate General* (a). Therefore, unless this testator was domiciled in England, no legacy duty is payable here. The facts stated in the affidavit shew that he was domiciled in Hamburgh; and for that reason his personal property was subjected to legacy duty in that country. Having acquired a foreign domicile, he cannot change it by merely declaring an intention “not to renounce his domicile of origin as an Englishman.” Apart from that declaration there is nothing to indicate an alteration of domicile, and the declaration only amounts to an expression of his wish at that time. In order to alter the domicile, there must not only have been an intention to change it, but also an actual change.

The Court then called on

Sir *R. Bethell* (with whom was *Beavan*), to support the rule.—The testator has declared his intention to retain his English domicile. Acts can only be regarded as evidence of intention. There being an express declaration by the testator that he was constituted a burgher for the sole purpose of trade, an intention to acquire a domicile cannot be inferred from equivocal acts. The testator in effect declares

(a) 12 Cl. & F. 1.

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that he went to Hamburg for the purpose of trade, and resided there for that purpose: that he never meant to be domiciled there, but intended to retain his domicile in England. There is no case in which an intention has been presumed in opposition to an express declaration. It is an established principle, that the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and acquiring another as his sole domicile: *Munro v. Munro (a)*. In Phillimore on Domicile (*b*), reference is made to “a case where a person who had been absent for fourteen years retained his domicile, by a correspondence intimating his intention to do so.” In the Appendix to the same work (*c*), there are the following (among other) maxims, extracted from Mascardus de Probationibus:—“1. Domicilium præsumitur in loco originis, nisi probetur esse mutatum \* \* \* \* 16. Ad domicilium constituendum necessario requiritur animus. 18. Domicilium ex animo incolæ contrahitur, et a summo animo pendet, ideo assertioni ejus, qui declaret animum suum, standum est.” The domicile of origin remains until there is a clear intention of abandoning it: *Somerville v. Somerville (d)*: here there is an express declaration to the contrary.

POLLOCK, C. B.—I am of opinion that the rule must be discharged. As observed by the Lord Chancellor in the case of *Munro v. Munro (a)*, “Questions of domicile are frequently attended with great difficulty; and as the circumstances which give rise to such questions are necessarily very various, it is of the utmost importance not to depart from any principles which have been established relative to

(a) 7 Cl. & F. 842, 876.

(c) Page 170.

(b) Page 148, sect. cclxxiv.

(d) 5 Ves. 749 a.

such question  
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particularly if such principles be adopted  
laws of England, but generally by the  
tries." No doubt, both on principle and  
n cannot get rid of his domicile of origin  
ing in another country, but the domicile  
he has manifested an intention of abandon-  
ing another as his sole domicile. Here  
re of such an intention. I consider the  
re testator as meaning that he intended to  
nburgh to live and die there, though it was  
of never coming to England again. Pro-  
for two domiciles. But in spite of a lurk-  
turn to England, his acts shew an intention  
at Hamburgh, and that is not affected by  
I think that the tribunals of Hamburgh  
ug that the testator was domiciled in that  
ing so, he could not help giving up his

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of the same opinion. According  
; Hamburgh was the domicile  
ore on Domicile, p. 11, it is  
sain domicile, according to the Roman  
law, in whatsoever place an individual has set  
up his household gods, and made the chief seat of his affairs  
and interests, from which, without some special avocation,  
he has no intention of departing; from which, when he has  
departed, he is considered to be from home; and to which,  
when he has returned, he is considered to have returned  
home." But for the declaration in the will, there could  
have been no doubt upon the subject. Then, what does  
the declaration mean? The testator does not say that he  
had no intention of remaining at Hamburgh during his life,  
but only that he wished to retain his English domicile.  
That he could not do.



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and bye-laws, and also to the provisions thereafter contained and indorsed thereon. That one of the provisions indorsed by the plaintiffs on the agreement, before and at the time the same was so made by the defendants, was and is that every guarantee upon gross annual returns, floating risks, &c., whatever might be the original term of the same, should, from the expiration of such original term, be treated as a renewed contract of the like nature and conditions, unless either the member interested therein or the board of directors should give two calendar months notice of an intention not to renew the same. And the defendants did thereby agree with the Company, in consideration of the said guarantee, to pay the Company the further sum of 37*l.* 7*s.* 1*d.*, being the remainder of the annual consideration payable thereon up to the 31st December, 1854; and also the sum of 43*l.* 15*s.* in each and every succeeding year during the term of the said guarantee at the times and in the amounts thereafter mentioned (that is to say), at such time or times as the directors of the Company should appoint by any notice to be left at the place of business of the defendant fourteen days before the time appointed. That the agreement of guarantee so made and entered into between the plaintiffs and defendants was and is a guarantee upon gross annual returns within the meaning of the said provision so indorsed upon the said policy, and that no notice of an intention not to renew the said guarantee at the expiration of the period of three years and one month has ever been given by the board of directors to the defendants, or by the defendants to the board of directors.—The declaration then averred that the plaintiffs gave to the defendants fourteen days notice to pay certain instalments of the sum of 43*l.* 15*s.*, being the annual premium for the year 1857, and 10*l.* 18*s.* 9*d.*, an instalment for the year 1858.—Breach: nonpayment.

**Pleas.**—First, that the sums accrued due and are claimed in respect of periods after the 31st of December, 1856; and that from and after such date the defendants ceased to contribute, and wholly refused to contribute to the funds of the Company; of which the plaintiffs had notice.

Secondly.—That the sums accrued due and are claimed in respect of periods after the 31st day of December, 1856; and that on such last mentioned day, without the knowledge or consent of the defendants, by mutual agreement between the plaintiffs and a certain Company duly incorporated and called “The Mercantile Guarantee and Assurance Company,” and which said last mentioned Company was composed of and consisted of other and different members than “The Solvency Mutual Guarantee Company,” the Solvency Mutual Guarantee Company became and was then dissolved, and the members thereof became and were amalgamated into, and became and were members of the “Mercantile Guarantee and Assurance Company,” and the business, funds and property of the Solvency Mutual Guarantee Company were transferred to the Mercantile Guarantee and Assurance Company.

Thirdly.—For a defence on equitable grounds: a plea stating that before and at the 31st of December, 1856, it had been *agreed* between the plaintiffs and “The Mercantile Guarantee and Assurance Company,” &c. (as in the second plea mentioned).

Demurrers to pleas, and joinders therein.

**Turner**, in support of the demurrers.—The first plea confesses the breach, without raising any defence. It admits that no notice was given by either party of an intention not to renew the contract, and simply states that the premiums accrued due and are claimed in respect of periods after the expiration of the three years. But no notice

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factors of the said affreighters a full and complete cargo of deals and battens, &c. ; and, being so loaded, shall there-with proceed to Gloucester and deliver the same, on being paid freight.—(Then followed provisions as to payment of freight) being in full of all port charges and pilotages. (The act of God, the Queen's enemies, &c., excepted.) The freight to be paid on unloading and right delivery of the cargo, one third in cash, and the remainder by approved bills at three months date. Thirty-five running days are to be allowed to the said merchant (if the ship is not sooner dispatched) for loading and discharging the said cargo, and ten days on demurrage above the said laying days at 5*l.* per day."

The defendants had, in the year 1856, contracted with Messrs M'Phelim, of Buctouche in New Brunswick, for the purchase of a quantity of wood goods, payment of which was to be made by the defendants' acceptance of their draft for the price, on presentation of the invoice and bill of lading; and the defendants directed the master to apply to Messrs. M'Phelim for a cargo.

The vessel set sail according to the charter, and arrived at Buctouche on the 29th of June following, and on the 2nd of July was reported to Messrs. M'Phelim, at Buctouche, to be, and was, ready to take in her cargo, according to the charter. On the 4th of July the loading was commenced, and was completed at the expiration of twenty-seven of the running days.

On the receipt of the cargo, the master signed and delivered to Messrs. M'Phelim bills of lading, by which the cargo was to be delivered "unto order or to assigns, he or they paying freight for the said goods as per charter-party, with average accustomed."

The invoice of the cargo and bill of lading, together with the bill drawn by Messrs. M'Phelim on the defendants for

the price of the cargo, were presented to the defendants through the Bank of British North America. The defendants refused to accept the bill on the ground that the cargo shipped appeared by the invoice to be different from the cargo contracted for, and the bill of lading in consequence remained in the possession of the Bank of British North America. The following correspondence took place between the defendants and the Bank of British North America.

The case then set out a letter, dated the 28th August, 1857, from the Bank of British North America to the defendants, stating that the Bank held the draft of Messrs. M'Phelim on them, dated the 6th August, 1857, for 442*l.* 0*s.* 10*d.*, which they had declined to accept. In answer the defendants wrote as follows:—

“Hull, 29th August, 1857.

“Gentlemen,—We declined to accept Messrs. M'Phelim's draft in consequence of the great variation of the shipment, p. ‘Skyeberg,’ from the contract, of which we gave full particulars to their agent at Liverpool.

“We cannot, in consequence, take the cargo to account; but, if you think proper, we will land it on arrival and take care of it on our own premises; and likewise, if you wish it, pay the freight on your account. If you agree to this, we are willing also to accept the captain's draft, which we presume is in your hands as well as that of the shippers, holding, of course, a lien on the cargo for the amount in the same manner as for the freight and charges.

“If you have any different or contrary instructions to give to the master on his arrival, be pleased to have them ready for him, so that he may commence discharging without delay. We ask this because, as charterers of the vessel, we may be liable in the first instance for any demurrage charge.

“We remain, &c.,

“BARKWORTH & SPALDIN.”

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On the 1st September, 1857, the Bank acknowledged the receipt of the defendants' letter of the 29th August.

The vessel sailed with her cargo for Gloucester, where she arrived in due course on the 5th of September, and on that day the master received from the defendants the following letter:—

“Hull, 29th August, 1857.

“Sir,—As charterers of your ship from Buctouche to Gloucester, we beg to inform you that the documents we have received of the cargo discover it to have been shipped entirely at variance with the contract, and we have therefore declined to take it to account, or to accept the shipper's draft, which is now held by other parties together with the B/L against advances made by them.

“The holders of the B/L are, of course, entitled to the cargo; but, should you receive no instructions from them in sufficient time to enable you to commence discharging without delay, we are ready, in order to prevent delay, to proceed with the delivery of your ship and land the cargo for account of whom it may concern, and pay you the freight as per charter-party, less the sum advanced you at Buctouche.

“We remain, &c.,

“BARKWORTH & SPALDIN.”

The master also received, on the 5th September, 1857, a letter from the Bank of British North America, stating that they held his draft on Messrs. Barkworth & Spaldin for 144*l.* 10*s.* 6*d.* which had been protested for non-acceptance, and requesting security for its payment at maturity. Also advising him not to part with the cargo without the production of a bill of lading indorsed by Messrs. M'Phelim.

The master received, on the 5th September 1857, the following letter written by the defendants' authority:—

“Gloucester, 5th Sept., 1857.

“Sir,—We are ready to receive the cargo of deals upon the terms mentioned in ours, dated 29th ulto.

"Should there be any demurrage in consequence of the deals not being discharged during the ship's lay days, we beg to inform you that you must look to the holder of the bill of lading for the payment thereof, and not to us.

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"Yours, &c.,

"Per. Pro. Barkworth & Spaldin,

"C. SMITH."

On the 8th September, 1857, Messrs. M'Phelim's draft on the defendants was again presented to them for acceptance and again refused, and, on the same day, the defendants wrote to the Bank of British North America complaining that they had caused the bill to be presented a second time, and stating that, as the vessel would come on demurrage, they would hold them responsible.

The defendants received, on the 13th September, 1857, a letter from the master, dated the 12th September, giving them notice that the lay days for discharging the "Skyeberg" would expire the 13th instant, and that the ten days over and above the lay days would commence on the 14th instant, the ship being then on demurrage at 5*l.* per day.

On the 9th September, 1857, the Bank of British North America wrote to the ship broker employed by the master at Gloucester, suggesting that the master should proceed to discharge the cargo with some house other than Messrs. Barkworth & Spaldin, for the benefit of whom it might concern, and giving notice not to deliver the cargo to them unless they produced the bill of lading; but that the master was to look to the charterers for his freight and demurrage, if any.

On the 22nd September, 1857, the master received a letter from the Bank of British North America, as holders of the bill of lading, requiring him to deliver the cargo forthwith to Messrs. Price & Co.; and giving notice that

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the Bank would pay the freight thereon in conformity with the bill of lading, and that he must look to the charterers for demurrage.

The vessel was, in fact, ready to discharge the cargo, according to the charter, from the 5th September. The running days, according to the charter, expired on the 13th September. The vessel might at any time have been discharged in five days; and, if the master had complied with the offer contained in the defendants' letter of the 29th August, might have been discharged within the lay days. The bill of lading was not produced to the master or the plaintiffs until the 22nd September. On the 23rd the unloading commenced, and was completed on the 30th September. The defendants never became owners of the cargo, or holders of the bill of lading. The bill of lading was indorsed for value before the arrival of the vessel at Gloucester, and the property in the cargo vested by the indorsement in the holders. The delivery of the cargo at Gloucester was to Messrs. Price & Co., holders of the bill of lading. They paid the freight, but would not and did not pay any demurrage or compensation for the delay in unloading.

The matters of fact alleged in the above correspondence, except that the plaintiffs are not to be considered as admitting that the shipment was at variance with the defendants' contract with Messrs. M'Phelim, are to be taken as parts of the case.

The actual damage to the plaintiffs from the delay of the vessel at Gloucester was for, during the last seven days of the delay, 35*l*.

The Court are to have power to draw any inferences of fact which they think may be reasonably drawn from the facts above set forth.

The question for the opinion of the Court is, whether the defendants are liable to the plaintiffs for any demurrage or damages in respect of the above named delays of the vessel at Gloucester; and, if they are, for how many of the days during which the vessel was detained are they liable? If the Court shall be of opinion in the affirmative, judgment is to be entered for the plaintiff for such sum as the Court shall think fit. If the Court shall be of opinion in the negative, judgment of non pros is to be entered.

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*Gray (West with him)* argued for the plaintiffs, in Trinity Term (June 2).—The defendants are liable to pay the plaintiffs 50*l.*, the amount of ten days demurrage, and 35*l.* for the seven days delay beyond the demurrage days. The charter-party contains an express contract by the defendants with the plaintiffs to pay demurrage. If the plaintiffs had unshipped the cargo, they would have rendered the master responsible to the holders of the bill of lading; for he contracted to deliver “unto order or to assigns.” Supposing it was not obligatory on the master to sign bills of lading, he did so at the request of the defendants’ agent. [*Martin, B.*—The defendants, by their letter to the master of the 29th August, 1857, offer to land the cargo for account of whom it may concern, and pay the freight.] By landing the cargo, the master would lose his control over it. If it was destroyed by fire in a warehouse, the master would be responsible. He only undertook to deliver the cargo to the person who should produce the bill of lading properly indorsed. If he chooses, for his own convenience, to land the cargo, he must take the risk, but he is not bound to land it. [*Martin, B.*, referred to the 8 & 9 Vict. c. 91, s. 51.] The charterer has a right to the use of the ship during the lay days and demurrage days,



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and until the expiration of those days the ship owner is not justified in warehousing the cargo. A person who receives goods under a bill of lading is not liable to pay demurrage, unless the bill of lading contains a stipulation to that effect: *Smith v. Sieveking* (a). The master has a lien for the demurrage, and is entitled to retain the cargo until the bill of lading is produced. His rights and obligations would be varied by landing the cargo. The ship owner and master are free from blame; and whether the fault is the defendants' in refusing the cargo, or the shippers' in not performing their contract, the defendants are responsible to the plaintiffs for the demurrage and detention.

*Mellish*, for the defendants.—The question is, by whose default was it that the cargo was not delivered within the stipulated time? The bill of lading does not make the holder liable for demurrage; and therefore the master was not bound, at his request, to keep the cargo beyond the lay days. The question depends on whether the ship owner or master would have been liable to an action or additional risk by landing the cargo. They might either have placed it in a bonded warehouse, or have delivered it to the defendants, who offered to take care of it for whom it might concern. If the cargo had been delivered to the defendants, they would have paid the freight, and held it for their lien in respect of the freight so paid. Then, what rule of law is there that, where a cargo arrives, and the holder of the bill of lading, not being liable to pay demurrage, has notice of its arrival, but does not choose to receive it, the master is bound to keep it on board? In such case, the master is entitled to land the cargo in any convenient place for delivery to the holder of the bill of lading; and, having

(a) 4 E. & B. 945.

done so, master and ship owner are free from liability, and the cargo remains at the risk and expence of the holder of the bill of lading. Suppose the holder of a bill of lading, not being liable to pay demurrage, never demanded the cargo until three or four months after the ship's arrival, would the master be bound to keep it all that time? Where the bill of lading contains no provision for payment of demurrage, the holder must demand the cargo within a reasonable time, or the master is entitled to land it. [*Bramwell*, B., referred to the judgment of *Parke*, B., in *Young v. Moeller* (a).] This subject was considered in the case of *Gatliffe v. Bourne* (b): there a plea that the defendants had landed the goods at a wharf was held bad, for want of an averment that they had kept the goods on board for a reasonable time, in order to enable the holder of the bill of lading to claim and receive them from alongside the vessel. It is the duty of the master to deliver the cargo to the merchant or his consignee upon production of the bills of lading and payment of the freight and other charges due in respect of it: *Abbott on Shipping*, p. 375, 8th ed.; but, if the holder of the bills of lading does not claim the cargo within a reasonable time after the arrival of the vessel, the master is justified in landing it. In the case of *Hyde v. The Trent and Mersey Navigation Company* (c) Lord *Kenyon*, C. J., and *Buller*, J., expressed their opinion that, where a ship owner has carried a cargo to its place of destination and no one is ready to receive it there, a delivery at the usual wharf is such a delivery as will discharge the master. Moreover, the bill of lading is a contract made by the master as agent of the charterer, not as agent of the ship owner: *Marquand v. Banner* (d); therefore, here the defendants, as charterers, are the principals

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(a) 5 E. &amp; B. 755.

(b) 4 Bing. N. C. 314.

(c) 5 T. R. 389.

(d) 6 E. &amp; B. 232.

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who contract to deliver the cargo to the holder of the bill of lading, and, if he does not come forward and claim it, they are the proper persons to have the custody of it for the purpose of completing their contract, and their warehouse would be the warehouse of the carrier. In *Colvin v. Newberry* (a) Lord *Tenterden* said, "Two propositions of law are clear, as applicable to a case like this: the first is, that in the common case of goods shipped on board a vessel belonging to a person, of which the shipment is acknowledged by a bill of lading signed by the master, if the goods are not delivered, the shipper has a right to maintain an action against the owner of the ship; the other, which is equally clear, is this, that if the person in whom the absolute property of the ship is vested, charters that ship to another for a particular voyage, although the absolute owner provides the master, crew, provisions and everything else, and is to receive from the charterer of the ship, a certain sum of money for the use and hire of the ship, an action can be brought only against the person to whom the absolute owner has chartered the ship, and who is considered the owner *pro tempore* during the voyage for which the ship is chartered." Also, in *Schuster v. McKellar* (b), Lord *Campbell* observed that, notwithstanding some early conflicting decisions, it seemed now settled that when the master signs bills of lading, he does so as the agent of the charterer, not of the ship owner. The mere shipment does not divest the owner's property in the goods, unless it appears that there was an intention that it should so operate; *Van Casteel v. Booker* (c), *Turner v. The Trustees of the Liverpool Docks* (d). The master was only bound to wait a reasonable time, and as the holder of the bill of lading would not claim the cargo, the master

(a) 1 Cl. &amp; F. 283.

(c) 2 Exch. 691.

(b) 7 E. &amp; B. 704.

(d) 6 Exch. 543.

should have landed it at a convenient place, and, having neglected to do so, the defendants are not liable for demurrage or detention.

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*Gray* replied.

*Cur. adv. vult.*

The learned Judges having differed in opinion, the following judgments were now delivered:—

**WATSON, B.**—The plaintiffs were the owners of a ship called the “Skyeberg.” The defendants were merchants in Hull. The action was brought for demurrage and detention of the ship under the following circumstances.—On the 27th of April, 1857, the defendants entered into a charter-party on the “Skyeberg” for a voyage to Buctouche for a cargo, then to Gloucester. Freight to be paid on delivery of cargo: thirty-five running days to be allowed to the said merchant (if the ship not sooner dispatched) for loading and discharging the cargo: ten days on demurrage above lay days, at 5*l.* per day.” The vessel proceeded to her port of loading and took in a cargo for which the master signed a bill of lading. Twenty-seven out of the thirty-five of the lay days were consumed at the port of loading. The bill of lading was sent to England by the shippers and tendered to the defendants upon their acceptance of bills for the same. The defendants refused to take the cargo or accept the bills, alleging that the cargo was not according to order. The bill of lading remained with the shipper’s agent. The ship arrived at Gloucester and was ready to deliver her cargo according to charter on the 5th of September. The lay days expired on the 13th of September. The bill of lading was not produced until the 22nd of September. The delivery was completed on

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the 30th of September. The vessel might have been delivered in five days at any time. Demurrage for ten days was claimed and damages for seven days detention beyond. The defendants contended that the plaintiff could not recover as the master might have landed the cargo in the lay days; and therefore it was the default of the shipowner, and consequently a claim for demurrage or detention could not be made.

I think the plaintiff is entitled to recover. In this case I have the misfortune to differ from my brethren; but I consider the law, and the application of the law, clear. The law will be found laid down by Lord *Tenterden*, as to the relative rights and duties of the shipowner and charterers, thus (a):—"When goods are put on board in pursuance of a charter-party, the master is to sign bills of lading; the charter-party being the instrument and evidence of the contract for conveyance, and the bill of lading the evidence of the shipping of the particular merchandize to be conveyed in pursuance of the contract." By the contract the charterer bound himself to load at the port of shipment, and to unload the vessel at the port of discharge. This he was bound to perform within the time limited for unloading, as observed by Lord *Tenterden* (b):—"And when the time is thus expressly ascertained and limited by the terms of the contract, the merchant will be liable to an action for damages if the thing be not done within the time, *for he has engaged that it shall be done*. In the language of Lord *Ellenborough*:—"The merchant is the adventurer who chalks out the voyage and is to furnish at all events the subject matter out of which the freight is to accrue."—The charterer is, by his contract, responsible for delays occasioned by the holder of the bill of lading: between the latter and the

(a) Abbott on Shipping, p. 261, 6th ed.

(b) Abbott on Shipping, p. 266, 6th ed.

shipowner there is no original contract. There may be a subsequent contract created, to pay freight in fact on the delivery of the cargo, with him; but such contract does not discharge the original charterer from being liable on his contract." By a letter on the 29th of August, the defendants informed the master that the holders of the bill of lading are entitled to receive the cargo, and that the defendants were ready to receive the cargo for whom it might concern. I am of opinion that the master was not bound to do so. By his contract to deliver the cargo at the ship side, the master could not be required to deliver without the production of the bill of lading for his protection. Lord *Tenterden* has laid this down in these terms (a):—"It is no answer to this claim (demurrage) for the consignee to allege that he did not receive the bill of lading in time and the master insisted on its being produced or an indemnity, for the owner had a right to insist for his own protection;" and this, in my experience, has been invariably acted upon. The holder of the bill of lading was entitled to the benefit of the lay days without paying extra freight, for they are inserted in the charter for the benefit of the merchant: per Curiam, *Reed v. Hoskins* (b). Demurrage days stand nearly on the same ground. Any expense or risk incurred in or about the landing or warehousing during that time could not be charged against the charterers or the owner of the cargo. Indeed, by letters from the shipper's agent, the master had notice not to part with the cargo without the production of the bill of lading. Another letter of the 9th of September suggests landing the cargo otherwise than at the defendants' warehouse. This letter left to the master the option to land or not to land, according to the suggestion, during the lay days; and I

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(a) Abbott on Shipping, p. 269, 6th ed.

(b) 6 E. & B. 972.

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think he was not bound to act on this suggestion, for up to this time it was not certain who would appear as owner of the cargo, holding the bill of lading to demand the cargo. I clearly think that for five days after the lay days the plaintiff is entitled to recover, and I think that the same reason applies to the demurrage days. The master was not bound to land the cargo and incur risk and expense thereby. The shipper and charterer were disputing whether the cargo was according to contract,—which party was right and which party was wrong the master had nothing to do with. He had to perform his contract to deliver the cargo on production of the bill of lading, and the charterer had bound himself that it should be cleared within the mentioned days. This has not been done, and I am of opinion that the plaintiff is entitled to our judgment, certainly for five days, indeed I think for the whole sum claimed.

BRAMWELL, B., said—The judgment which I am about to deliver is that of the Lord Chief Baron, my brother *Martin* and myself.

We are of opinion that the defendants are entitled to judgment. The plaintiffs were owners of a ship, which the defendants chartered for a certain voyage, provision being made in the charter-party for lay days and demurrage days. When the ship arrived at the port of loading, Messrs. M'Phelim loaded on board a cargo of timber for the defendants, and took from the master bills of lading making the timber deliverable "unto order or assigns, on payment of freight as per charter-party." The invoice of the cargo and bill of lading, together with a bill drawn by the shipper's agent on the defendants for the price of the cargo, were presented to the defendants, who declined to accept the bill or take the cargo, on the ground that it did not

correspond with the contract; but they offered to unload the cargo on the arrival of the vessel and take care of it on their premises, not on their own account as having a right to it, but as deposites for the benefit of the party entitled to it. When the vessel arrived, eight of the lay days were unexpired. The defendants' offer was not accepted, and the bill of exchange was again presented to them, when they refused to accept it and take the cargo. At that time only four or five of the lay days remained. According to our view of the facts, the holders of the bill of lading were aware of the arrival of the ship and would not unload.

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Under that state of things the question is whether the plaintiffs, the shipowners, have a remedy against the defendants, the charterers, for demurrage. That depends on whether the defendants complied with their contract. Now, their contract was to unload the vessel within the lay days or pay demurrage; they did not unload, but they offered to do so, and if that offer was according to their contract the master was bound to accept it. The only thing that can be objected to it is, that the defendants were not the holders of, and did not produce the bill of lading. As a general rule, a master is not bound to unload except on production of the bill of lading, for if the goods should get into the possession of a third party, who should refuse to deliver them up, the master would be responsible. Therefore, if the bill of lading is not forthcoming, the master is in general justified in refusing to deliver up the goods, because the holder of the bill of lading may come forward and say that he is entitled, and consequently the master has a right to say, "I am not bound to unload unless I am secure from the claim of the holder of the bill of lading." Then the question is whether, in this case, any action could be maintained by the holders of the bill of lading against the master for unloading the cargo, or



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whether the master had any reasonable ground to suppose there would be, so as to justify his refusal to unload. That makes it necessary to consider the rights of the holders of the bill of lading. The holder of the bill of lading is entitled to have the goods delivered to him direct from the ship. Assuming that in this case the holders were entitled to the lay days, they were not entitled to more; and within a reasonable time after the arrival of the ship they were bound to unload. They would therefore have had no right to complain of the captain for unloading, for eight days before the expiration of the lay days they had notice of the arrival of the ship and that the charterers refused to accept the cargo; and consequently they had notice within a reasonable time so as to have enabled them to unload. They did not unload within that time, and the captain would have been as much justified in unloading within the lay days as he would be in unloading after the expiration of those days; and certainly after the expiration of the demurrage days he would not be bound to have kept the goods in the ship, but could have put them in a convenient place for the owner. Nor could the holders of the bill of lading have made out a case of conversion of the goods, as nothing would have been done with them inconsistent with the bare right to them. All these facts were known to the master in sufficient time for him to have accepted the defendants' tender to unload and to have had the ship unloaded within the lay days. He would therefore have incurred no liability, nor had he any reasonable ground to expect any liability if he acted on the defendants' tender. He ought therefore to have done so, and was not justified in throwing the burden of not unloading on the charterers.

Judgment for the defendants.

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*429. 444. 2 v. 1 pp.*

CAMMELL and Others v. SEWELL and others.

July 1.

**T**ROVER for deals, with a count for money had and received.

Pleas to the first count: First, Not guilty.—Secondly, that the goods were not the goods of the plaintiffs. To

Trover for deals. Pleas: not guilty: not possessed. The plaintiffs were the underwriters on a cargo of

deals, valued in the policy at 1,100*l.*, shipped on board the Prussian vessel "Augusta Bertha," from Onega to Messrs. S. at Hull. On the 17th of September the vessel struck on the rocks on the coast of Norway. On the 4th of October Messrs. S. gave notice of abandonment of the cargo as totally lost. The plaintiffs accepted the abandonment and paid as for a total loss. On the 23rd of September the master had written to inform the owners of the cargo of the loss of the vessel. Before receiving an answer, the master and his agent took steps to cause an act of survey of the vessel and cargo to be held. On the 27th of September the surveyors recommended, as best for all parties, that the vessel and cargo should be sold. At that time the cargo had been safely landed. The master and his agent then applied to an officer, called the sheriff and director of auctions, to appoint a day for the sale, which, in pursuance of such appointment, took place on the 15th of October. At the sale one J., the agent of the underwriters, publicly protested against the sale, but the officer presiding, deeming the proof of his authority insufficient, decided that the sale should proceed. The act of survey and public auction are judicial proceedings from which, by the law of Norway, appeals lie. J., as agent for the underwriters, then instituted in the superior Court in Norway a suit against the master, his agent and the purchaser of the cargo, praying that the public auction should be disavowed, and that the purchaser should be compelled to deliver up the goods in specie: in November, 1853, judgment was given that the auction should be confirmed. The deals were forwarded by the purchaser to the defendants in London who had made advances upon them, and who refused to deliver them up to the plaintiffs on a demand by them in April 1853. The deals realized 1,470*l.* There was evidence that, by the law of Norway, a sale by the master would transfer the property in the cargo.

*Held*: first, that, notwithstanding the abandonment, as there was no necessity to justify a sale, if the case had rested on the law of England or the general maritime law the purchaser would have gained no title as against the owners.

Secondly: that upon the acceptance of the abandonment by the underwriters their title to the cargo had relation back to the time of the alleged loss; and, therefore, that the plaintiffs might maintain trover, though the sale was before the acceptance of the abandonment.

Thirdly: that such title was a title to the cargo itself in the state in which it was at the time of the loss, and not to the price only for which it had been sold in Norway.

Fourthly: that the propriety of the abandonment was a question solely between the insured and the underwriters, with which the purchaser of the cargo had nothing to do.

Fifthly, that the plaintiffs were concluded by the judgment of the Court in Norway that the sale was valid.

*Semble*, that the judgment was one *in rem* which finally decided the question as to the status of the property.

But *Held*, sixthly, that, assuming the judgment to be *in rem*, it was not necessary to plead it; and that it was conclusive evidence on the plea that the goods were not the goods of the plaintiffs.

Seventhly, assuming the judgment not to be *in rem*, that because the plaintiffs had sought their remedy in a foreign court of competent jurisdiction, they were conclusively bound by the judgment of such court.

Eighthly: that such judgment could only be impeached on the ground of fraud in the Court or in the procuring of the judgment, and not on the ground of any fraud of the defendants in that suit.

Lastly, that it was not material that the judgment was given after the conversion.

*Quære*, whether the validity of the sale should have been decided according to the law of Norway or the law of the domicile of the owner of the goods.

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the second count, Never indebted.—Whereon issues were joined.

At the trial a verdict was taken for the plaintiffs, subject to a special case; the parties being at liberty to refer to an appendix containing the depositions of witnesses examined under several commissions at Molde and elsewhere, the material facts being, in substance, as follows:—

The plaintiffs are underwriters at Hull; the defendants merchants in London. The action was brought to recover part of a cargo of deals shipped on board the Prussian ship “Augusta Bertha” at Onega, in Russia, by the Onega Wood Company, for Messrs. Simpson & Whaplate of Hull, and by them insured with the plaintiffs for 1150*l.* by policies valuing the deals at that amount. The deals were consigned to Messrs. Simpson & Whaplate under a bill of lading in the ordinary form. The plaintiffs at first refused to accept the notice of abandonment; but, on the 14th of December, 1852, paid Messrs. Simpson & Whaplate as for a total loss. The portion of the cargo in question subsequently came to the hands of the defendants under the circumstances hereinafter mentioned, and was sold by them, realizing the net sum of 1470*l.* 4*s.* 2*d.*, which the plaintiffs seek to recover in this action.

On Saturday the 17th of September, the “Augusta Bertha,” having put into Haroe Roads in consequence of the shifting of her deck cargo, drove from her anchorage on the rocks at Smaage, about three miles from Molde in Norway. On Monday the 19th the captain commenced discharging the cargo, which was ultimately stacked on two small islands. The ship was much damaged; and it would have cost more to repair her than she would have been worth. The cargo was not materially damaged. Witnesses, however, stated that as it stood it was exposed to injury from the weather and sea water: that possibly

some of it might be washed away in storms; and that it would require to be watched. The wreck lay out of the track of shipping. There was no harbour; the anchorage at Smaage was bad, and ships could not have been readily obtained for the purpose of forwarding the cargo to its destination. There was a conflict of testimony as to whether or not a prudent owner, if uninsured, would have sold the cargo on the spot.

On the 23rd of September the captain of the "Augusta Bertha" addressed a letter, of which the following is a copy, to Messrs. Simpson and Whaplate:—

"Molde, 23rd Sept., 1852.

"I am very sorry to inform you that I have had the misfortune to get ashore in Haroe Roads, Norway, into which I had been driven by a want of provisions and by bad weather. The vessel stands very badly, and is very much damaged, and full of water, so that it is impossible to put her again into a seaworthy condition. I have discharged one third of the cargo in order to float the ship, but have not succeeded in doing so. The deals, which are discharged, are very much damaged. As there is no English agent or consul here, I have applied to Bastian Width, in Molde, which is about three Norwegian miles from the place of the strand. I now beg you to write me or Mr. Width what you intend to do with the cargo in case the ship is entirely lost.

"Awaiting your reply,

"T. H. MICHAELSEN."

After the receipt of this letter, Messrs. Simpson & Whaplate abandoned the cargo as above mentioned, and the bill of lading of the "Augusta Bertha" was indorsed to the plaintiffs and delivered to them. On the 12th of October Messrs. Simpson & Whaplate, and Mr. Park agent

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for the plaintiffs, respectively, wrote to the captain of the "Augusta Bertha" as follows:—

"Hull, 12th Oct. 1852.

"To Captain T. H. Michaelis, of the ship 'Augusta Bertha.'

"Sir,—Your letter dated 23rd ult. came to hand, and we are very sorry to hear of your misfortune with the 'Augusta Bertha' being stranded and full of water. The underwriters, who have insured the cargo, wish you to give what further information you can. It is desirable that you should make a protest of the loss of the ship and cargo, and send it to us as early as possible. We send a letter on the other side addressed to you by Mr. Richard Park, who is agent here for the underwriters who have insured the cargo.

"We remain,

"Your obedient servant,

"SIMPSON & WHAPLATE."

"Captain T. H. Michaelis of the 'Augusta Bertha.'

"Hull, 12th Oct. 1852.

"Sir,—Messrs. Simpson & Whaplate have handed to me your letter to them, dated 23rd September last, containing an account of the stranding of your vessel from Onega to this port. I beg to acquaint you that on behalf of the underwriters on the cargo, I had previously written to Messrs. Hermann, Hoe & Co., agents to Lloyds, for Molde and places adjacent, *requesting them to prevent a sale of the cargo until further orders from England, and I trust you will do your best to carry these instructions out and use your utmost endeavours to save the whole of the cargo.*

"I am, Sir, your obedient,

"RICHARD PARK,

"On behalf of the underwriters."

Previous to this, Messrs. Fraser, Redman & Co., of London, had written to Mr. Jervell as follows:—

“ C. S. Jervell, Esq., Molde,

“ London, 2nd Oct. 1852.

“ Sir,—Messrs. Sewell, Hanbury & Sewell, of this city, have been good enough to favour us with your address, and we have no doubt that their introduction will induce you to pay the utmost attention to the following:

“ The ‘Augusta Bertha,’ Captain T. H. Michaelis, of Memel, bound from Onega to Hull with deals, is, according to a report in the *Hamburgh Borsenhalle* of the 29th inst., stranded on the Island Agaronen, about three miles from Molde, during a S.W. storm, and full of water.

“ The vessel as well as the freight has been insured through us with different underwriters at Lloyds, and, on behalf of these underwriters concerned, perceiving that the nearest agent to Lloyds is so far off as Drontheim, we have to request you to assist the captain in all possible ways.

“ 1st. To get the ship off and into your port in order to repair it fit for the remainder of the voyage.

“ 2nd. If it should not be possible to get it off, to see that from the ship and the inventory shall be saved the greatest possible part.

“ 3rd. In this case, to save from the cargo as much as you can, to engage a vessel at the cheapest rate, and despatch it according to the bill of lading of the ‘Augusta Bertha.’

“ You will be aware that the underwriters of the freight of the ‘Augusta Bertha’ have, in case the ship cannot proceed on the voyage, to pay the difference between the freight from Onega to Hull and that which the captain earned for the part of the voyage which he performed to Molde; and you will therefore be good enough to look

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that justice is done in the settlement to the underwriters concerned.

"We hope to hear soon from you a detailed report in this affair in order to be able to lay it before the underwriters.

"And remain, Sir,

"Your most obedient,

"p.p. FRASER, REDMAN & Co.

"E. E. WENDT.

"P.S.—The underwriters especially desire us to add, that they expect that you will act in this affair as if ship and cargo were your own and not insured."

The last mentioned letter was received by Mr. Jervell before the alleged sale of the ship and cargo, and the after mentioned steps were thereupon taken by him.

Immediately after the wreck the master, Michaelis, had employed Mr. Width to act as his agent. On the 22nd of September Width wrote to a Mr. Delphin, an officer called the "sheriff and director of auctions," to appoint a time for holding an act of survey, estimate and investigation of the ship and her cargo. And by an indorsement, dated the 24th of September, Mr. Delphin appointed Monday the 27th for that purpose. Width also wrote to Wetlesen, the bailiff, to request him to appoint examiners and surveyors; and accordingly five persons were appointed.

On the 27th the surveyors attended and made a report, which was signed by Mr. Delphin and themselves, "that it would be for the interest of the underwriters and all parties concerned that the remainder of the cargo should be discharged, and that the whole of the cargo should afterwards be sold by public auction" (a). After these pro-

(a) From the minutes of a court held at the sheriff's office at Romsdal.

ceedings, Michaelis, with his agent Width, on the 30th of September caused a requisition to be made to the sheriff to have not only the ship and her stores, but likewise the cargo, sold at the place where she had stranded; and in a postscript it was stated, that it was hoped that the sheriff would appoint the sale to be held on the 13th at the latest. An auction court was appointed to be held on the 15th by Mr. Delphin. The proceedings were conducted on behalf of Mr. Delphin by his sworn agent Mr. Matthiessen.

On the morning of the sale Mr. Jervell, who on the previous evening had received the above mentioned letter from Fraser, Redman & Co., saw Captain Michaelis and delivered to him a letter from Fraser, Redman & Co., enclosed in the letter to himself, in which they requested Michaelis to take his instructions from Mr. Jervell. Michaelis, after consulting with Width and Hans Clausen, the British Vice Consul, refused to attend to the letter, saying that he had no acquaintance with Fraser, Redman & Co. Mr. Jervell then caused the letter to be translated and read to the persons present in the Norwegian language, and he protested in the most solemn manner against the sale both of the ship and cargo, holding all persons concerned responsible. Clausen stated that he had already, by the previous post, received a letter dated London the 2nd of October, and signed by James Moor, secretary to an insurance company, wherein Moor stated that the cargo was insured, and requested him to demand the delivery up of the cargo on payment of the expenses incurred; for which purpose Moor had promised to forward a bill of lading of the cargo, but as the writer was totally unknown to him, and as the power of attorney had not arrived, he was unable to take any steps, but as he was fully convinced that everything had been done for the interest of all parties concerned, he would consequently only now reserve the rights of all parties.

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Matthiessen decided that the auction should proceed upon the responsibility and liability of the requisitionists, Jervell protesting against the decision.

The cargo was bought by Hans Clausen for 3001 specie dollars. The plaintiffs have not received any portion of the purchase money.

Jervell then instituted a suit to set aside the sale, and from the minutes kept in the superior diocesan Court of Trondjhem, it appeared that on the 25th of November, 1853, a superior diocesan Court was held, and in the cause, "Jervell v. The Shipmaster T. H. Michaelis, together with his agent B. M. Width and consul H. Clausen," there was pronounced the following judgment:—

"When the barque 'Augusta Bertha,' under the command of the shipmaster Michaelis, had stranded during her voyage from Onega to Hull with a cargo of fir planks, &c., the said shipmaster caused an act of survey, investigation and estimate, respecting the stranding of the said vessel, to be instituted; and on the 15th of November he caused a public sale to be held at which the ship with her appurtenances was knocked down to C. S. Jervell, and the cargo to the British vice-consul H. Clausen.

"This public auction was interdicted by Jervell, before this Court, on behalf of the underwriters, by his having cited Michaelis, Width and Clausen;" and he caused it to be insisted upon, "that the public auction should be disavowed, and that consul Clausen should be bound either to deliver up to the underwriters the cargo of fir planks which he had bought in naturâ, or if this could not be done to make compensation for the loss and damage, &c. \* \* \* And that Michaelis or Width, separately or singly, be held bound to make compensation to the underwriters."

"The parties cited caused it to be insisted on that the proceedings of the public auction should be confirmed, and that they should be absolved from Jervell's accusation, &c."

(After disposing of a preliminary point, as to Jervell's having cited the defendants, on behalf of the underwriters, without naming such underwriters, the judgment set out fully the facts of the case, and proceeded as follows :)

"What the citers more especially complain of in this cause as regards the conduct of the parties is, that Michaelis and his agent Width, instead of awaiting an answer to the letter addressed to the consignee of the cargo at Hull, have, by a hurried public sale, disposed of the ship and cargo upon an exceedingly short notice, notwithstanding that the underwriters had, through the medium of their sworn brokers, Fraser, Redman & Co., made known to Michaelis that he was to follow the instructions of Jervell, and that this latter had protested against the auction being held ; the auction was held, and that before there was sufficient time for the sworn brokers' firm legally to prove themselves to be what they represented, viz., that they were the actually authorized agents of the underwriters : that he ought, in his capacity of *negotiorum gestor* for the consignee of the cargo and the underwriters, to have stopped the public sale when he received intimation that the real parties concerned intended to act themselves in the business."

"Here it must be observed that the shipmaster's relation to the consignee of the cargo is not the same as a *negotiorum gestor* in general \* \* \* He is, however, in the event of an average occurring, bound to take the management of the cargo, and take care of the same, which both the interest of the owners thereof or the underwriters must dictate to him \* \* \* As the shipmaster, under the doubts which may arise as to how the affairs of the ship and cargo ought to be conducted, is in possession of a legal act of survey according to which the same is recommended to be sold without the least delay, which is the case in the present instance, it would be in the highest degree hazardous

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for the shipmaster to put himself in opposition to such an act of survey, &c. \* \* \* The act of public sale must be confirmed. It follows, that the demand made for the delivering up of the effects and compensation for loss can likewise not be acknowledged, but the parties cited must be discharged.

“The following is therefore found to be right and just.

“The public auction held is to be confirmed. The parties cited, viz. the shipmaster Michaelis, B. M. Width and Hans Clausen, must be absolved from the accusations made by C. S. Jervell, the citing party in this cause.”

The cargo remained in Norway throughout the winter, and in the spring Hans Clausen caused a considerable portion thereof to be shipped by a vessel called the “Mindet” for London, under a bill of lading deliverable to the order of Hans Clausen and by him indorsed to the defendants, who had made advances on the cargo. The case set out extracts from the correspondence between the defendants and Hans Clausen.

The “Mindet” arrived in the Thames in April, 1853, when the plaintiffs immediately caused a notice to be served on the defendants requiring them to deliver up the deals. The cargo was afterwards sold by auction, and the net proceeds received by the defendants on the 9th of December, 1853, were 1470*l.* 4*s.* 2*d.* The damage sought to be recovered in the present action is that sum, with interest at 5*l.* per cent. from the 9th December, 1853.

The evidence as to the law of Norway was as follows:—

Homann, an advocate in the Supreme Court of Norway, stated: By the law of Norway, in case a ship be wrecked and there be no person present on behalf of the owner of the cargo, the captain has to act for the owner as he may himself think fit. Should he commit any fault, he may be responsible to the owner; but what he does is valid in

regard to third parties. That applies to the sale of the cargo, and in such a case the purchaser obtains a good title, which would be good though the captain had imprudently sold the cargo. The purchaser is not bound, in case of a wreck, to see that the captain has properly exercised his authority in selling the cargo. It is not necessary for the captain to get any decree or authority from any court before exercising his authority; he acts upon his own judgment. It is not distinctly stated in the law whether he should sell by public auction or by private contract; but the ordinary practice is to sell by public auction. When the sale is by public auction, it is usual for the judge of the place to act as auctioneer; the judge is licensed by the government for that purpose. Public notice is always given of the sale. Every auction in Norway is regarded as a judicial act, which can be appealed against. In case of an appeal the decision is conclusive between the parties. Supposing a ship to be wrecked or disabled in the district of Christiansand, there being no person present on the part of the owner, a sale by public auction by the captain is binding upon the owner of the cargo. That is, supposing the ship could not be repaired, which is to be ascertained by proper surveyors who are appointed for every case.

On cross-examination he said that the ordinary maritime laws of Europe are rules where there is no special law in Norway, or where the rules could not be deduced from the principles of Norwegian law: and he referred to a book of Danish laws, which he said were the same as the Norwegian law (*a*), and the law of the 13th of August, 1842, as to the

(*a*) The following extracts, amongst others, were set forth in the case:—

“Book 4, chap. 2, art. 5, p. 599.

“If the captain come into a foreign country and carry on any traffic either for purchase, sale or freight or any other that can be named, and have under hand and seal pledged his owners who are at

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law of auctions. If a foreign ship be wrecked on a Norwegian shore, probably the law of the country to which the ship belonged would prevail. The rules above mentioned are not laid down distinctly as to foreign vessels. An appeal from a sale by auction may take place within three years afterwards. Such appeal may be at the suit of any person who feels himself aggrieved, and against those who caused the auction or purchased the goods. An appeal is allowable in the case of the sale of the cargo of a shipwrecked vessel, and, if successful, the judgment would be that the auction should be annulled, in which case the purchasers would have to redeliver what they had purchased upon receiving back the price paid. The requirant of the auction would have to return the monies paid, and if he were insolvent the loss would generally fall upon the purchaser.

On re-examination, he stated that he thought that the rules of Norwegian law ought not to be applied to the case of a Prussian ship coming from a Prussian port to England, and wrecked upon the coast of Norway, though in Norway

home, that they shall be responsible, answer and satisfy the same, they are not by any means bound to do so; for a captain has no power over his owner's goods more than what he has in his custody, namely, the ship he commands and the goods appertain-

ing to it. But if any one have purchased, sold or dealt with the captain, then he must recover his loss from the ship and not from the owners personally, unless the owners (take to the merchant's goods) in any way connected with the transaction themselves."

"Book 4, chap. 2, s. 15.

"Should it happen that a ship is delayed a long time on its voyage and there are wanting provisions or any other thing necessary for the use and service of the ship, and the master had no money to buy them or can in time obtain it by drawing bills on his owners, then he may sell of the

merchant's goods so much as he requires for that purpose and not more, and the captain shall pay for such goods the same price as the remainder is sold for in the market, and the merchant deducting his freight\* in the payment."

\* The freight that was his due for the quantity of goods sold.

itself the sale would be respected and valid. The Norwegian law would be valid in Norway because the captain's authority over the goods would be considered to be of necessity when there was no one else present to represent the owners.

Neils Aveschong, of Molde, who described himself as the Amtmand, or highest civil administrative officer of the district of Romsdal in Norway, said that, in case of a ship being wrecked in Norway, the master of the ship, if on the spot, would have a right to dispose of the ship and her cargo. There is no law which imposes on the master the duty to require any judicial act. But, to secure himself from responsibility to the owners and underwriters, he may require such proceeding, and particularly a proceeding of wrecking, inspection, discernment and taxation. Such proceeding consists in inspecting, discerning and valuing a wrecked vessel, and must be considered a judicial proceeding so far as it may be appealed from. The master is not bound by the result, because, independently of it, he can act with binding effect upon the owners. The inspectors are nominated by the magistrate (Foged) of the district; the ordinary judge administers and they must give their judgment according to their conscience and the oath they are obliged to take. Referring to the minutes of the Court, such proceedings were duly taken in the case of the "Augusta Bertha." Where a ship has been wrecked, and the owners are absent from Norway, the master of the ship must be considered competent to dispose of ship and cargo, and in any case the disposal he might make will be acknowledged as valid in Norway. If the master of the ship has not exercised a sound discretion in selling the ship and cargo according to the laws and practice of Norway, that circumstance will not impeach the title of the purchaser, but the

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master of the ship may in that case incur personal risk as respects owners and insurers. A public auction, according to the law of Norway, is considered a judicial act. All concerned could appeal against it in the ordinary higher court of the district, in this instance the Stifts Overret of Trondhjem. The legal validity of the auction is preserved when confirmed by the higher court.

On cross-examination, he stated that the legal and usual proceeding relating to wrecking applied to all ships wrecked on the coast of Norway without exception.

His evidence was confirmed by that of Matthiessen, a solicitor, who spoke to the proceedings above set forth as being the judgment in the Stifts Overret of Trondhjem.

The Court is to be at liberty to draw all inferences of fact which a jury might draw.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover. And if the Court shall be of opinion in the affirmative, judgment is to be entered for the plaintiffs for such amount as the Court shall direct. But if the Court shall be of opinion in the negative, then the verdict entered for the plaintiffs is to be set aside, and a verdict entered for the defendants, or a nonsuit, as the Court shall direct.

*Hugh Hill* (with whom was *Milhoard*) argued for the plaintiffs (a).—The solution of the question between the plaintiffs and the defendants depends upon whether the Captain had authority to bind the owners of the cargo by a sale. The facts shew that there was no necessity to justify a sale. The goods were not perishable, and they were not sold in order to procure funds to repair the

(a) In Easter Term, April 26, 28, and May 6. Before *Pollock*, C. B., *Martin*, B., and *Channell*, B.

ship. In fact, a prudent uninsured owner would not have sold them. In *Morris v. Robinson* (a) the master of a ship injured by the perils of the sea ran into the Mauritius. The cargo was put on shore, when a part of it was burnt. The captain afterwards abandoned the ship and cargo, thinking it best for the interest of all concerned to do so; and the ship and cargo were sold, by an order of the Vice Admiralty Court there. The owner of a portion of the cargo, which was not damaged or perishable, was held entitled to recover in trover from the purchaser; the Court holding that a captain has not any authority to sell the cargo unless in cases of absolute necessity, and that the decree of the Vice Admiralty Court did not validate the transaction. *Freeman v. The East India Company* (b), *Cannon v. Meaburn* (c) and *Reid v. Darby* (d), there relied on, are to the same effect. It is no answer that the cargo would be liable to injury if it remained where it was. In *Tronson v. Dent* (e) it was said that though "the cargo is not to be left to perish, or to be left unregarded and uncared for," \* \* \* "if the goods can be carried to the place of their destination in a merchantable state, although very much damaged, it is a grave question whether the master can in any case be justified in selling the cargo because the goods would be more damaged in the course of conveying them from the place where he repairs his ship to the place of ultimate destination." Considering the distance, and the means of communication, the master should have awaited instructions from the owners of the cargo. Such communication was held essential to the validity of a bot-tomry bond in *Wilkinson v. Wilson* (f).

Secondly, it will be urged that the plaintiffs, the underwriters, have no right to maintain this action. The notice

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(a) 3 B. &amp; C. 196.

(b) 5 B. &amp; Ald. 617.

(c) 1 Bing. 243.

(d) 10 East, 143.

(e) 8 Moo. P. C. 419, 449. 450.

(f) 8 Moo. P. C. 459.



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of abandonment was before the sale, though the money was not paid until afterwards. The date of the acceptance is not stated in the case. Now the effect of the abandonment is, "to transfer the whole interest in all that remains of the thing insured, so far as it is covered by the policy, together with all the rights and liabilities arising out of its ownership from the assured to the underwriter," "not only from the time that notice of abandonment is given, but, by a retrospective operation, *from the moment of the casualty that gave the right to abandon*, from which time the underwriters, by virtue of the notice of abandonment, are subrogated into the place of the assured as complete owners of the abandoned property, so far as it is covered by the insurance:" Arnould on Insurance, s. 413, p. 1178. If, after abandonment, a vessel supposed to be lost should be discovered it will belong to the insurer: per *Gibbs*, C. J., in *Houstman v. Thornton* (a). So, if there be a sale, the proceeds become money had and received to the use of the underwriter after payment by him of the total loss: per *Curiam*, *Roux v. Salvador* (b). In *Robinson v. The United Insurance Company* (c), a case decided in the Court

(a) Holt, N. P. C. 242.

(b) 3 Bing. N. C. 286, 288.

(c) 1 Johnson's (U.S.) Reports, 592. The marginal note of this case is as follows:—Goods were insured from New York to Cadiz, St. Lucia or Malaga, and were consigned to the master with directions in case of accident to send bills of lading to the correspondents of the insured at those places. During the voyage the vessel was captured by a French privateer and carried into Malaga, and was there condemned by the French consulate as good and lawful prize. The property was abandoned to the insurers, who accepted the

abandonment and paid as for a total loss. The correspondents of the insured at Malaga, at the request of the master who did not know of the insurance, and without any instructions for that purpose, purchased the cargo of the captors by means of a broker, and sold it. After reimbursing themselves for the money advanced they invested the residue in a cargo of wine and brandy, which was shipped in the vessel for the account and risk of the insured, who received and sold the articles. In an action of trover, brought by the insurers against the insured to recover the amount of

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of Errors of the State of New York, it was said that "the acceptance of the abandonment by the insurer and a consequent satisfaction of the policy vests the property saved in the insurer, and, in its effect, has a relation to the event which produced the loss \* \* \* A suspension of the acceptance can have no other effect than to enable the insurer, by possessing himself of the knowledge of all circumstances, to ascertain the extent of his liability on the policy, whether for a total or partial loss. If partial, the abandonment does not of course bind him; if total, he, as a legal consequence, succeeds to the right of the insured as to the property saved *cum onere*. The time of acceptance can therefore have no influence on the determination of this cause, as the adjustment of the policy fixed the rights of the parties by their voluntary and mutual acts on the question of abandonment, and whatever part of the subject insured was saved, became the property of the defendants in error (the insurers) in the state it then was."—Thirdly, it is not shewn that, according to the law of Norway, the captain had a right to sell (a).—Fourthly; the validity of the contract of sale of the cargo must be decided by the authority of the master, not according to the *lex loci contractus*, but according to the law of the domicile of the owner: Story's Conflict of Laws sect. 286 b. [*Martin, B.*—In *Christian Sattler's Case* (b) there was much discussion as to the law prevailing on board a ship. It appears that the law follows the ship every where. If a foreign vessel is in an English port it is the

the goods thus received and sold, it was held that a purchase of the property insured by the agent or correspondent of the assured, is for the benefit of the owner or insurer after abandonment and payment, if he choose to affirm the purchase, and if the proceeds of such purchase and a subsequent

sale are invested in other goods, they become the property of the insurer also, for which he may maintain trover if he elect to confirm the acts of the agent.

(a) The arguments on this point are omitted.

(b) 1 D. & B. C. C. R. 539.


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same as if she was on English land; but as soon as she quits the port the law of the domicile of her owner prevails.] Those who deal with the master know that he is an agent, and must ascertain the extent of the authority which he possesses. "Such transactions must be held to have reference to the master's implied mandate according to the law of the country from which he comes:" Brodie's note to Lord Stair's Institutes, vol. 2, pp. 955, 956, adopted by Lord Stowell in "*The Nelson*" (a). It is a general rule that the right and disposition of moveables is to be governed by the law of the domicile of the owner and not according to their local situation: Story's Conflict of Laws, ss. 376, 380. [Martin, B.—Suppose the goods of a Frenchman living in lodgings here were distrained, is it contended that the French law would prevail? Wilde.—In Story's Conflict of Laws, sect. 388, it is explained that if a foreigner or stranger sends his property within a jurisdiction different from that within which he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. Channell, B.—The ship belonged to a Prussian master.] The plaintiffs' contention is, that, inasmuch as the cargo belonged to an English owner, the right of the master to deal with it depended upon the English law.

*Wilde* (with whom was *Honyman*), for the defendants.—The captain is the agent in some sense of the owners of the goods. It is his duty to take the goods to their destination, and he is therefore forbidden, except in cases of absolute necessity, to sell the goods: Abbott on Shipping, part 3, c. 3, 8 b. p. 301, 9th ed. His position is different where the owner of the goods has treated the adventure as at an end, and has abandoned the goods. Here the cargo was abandoned to the underwriters and accepted by them as totally lost. The foundation of the title of the plaintiffs,

(a) 1 Hagg. Adm. 169, 175, 176.

therefore, is that the goods could not be carried to their destination. In such a case the captain becomes *agent for the underwriters*, to do what is best for the salvage. The principle which governed *Morris v. Robinson* (a) and *Freeman v. The East India Company* (b), where the captain was acting as agent to forward the goods to their destination, does not apply. Suppose a ship loaded with warlike stores is detained in a foreign port. If the merchants there offered a large price for the stores, however advantageous the offer might be to the owners, the captain could not sell; but if the cargo could not be sent on and was abandoned, would not the captain, as agent for the underwriters, be at liberty to sell it? [*Martin, B.*—The captain has no authority to sell the goods merely because it would be for the advantage of the owner that he should do so. In ordinary cases no one but the owner can deal with the goods. But the case of "*The Gratitude*" (c) has established the exception, that in cases of necessity the captain may have authority to sell. There, however, the cargo of oranges would have become a rotten mass if carried on. Here the cargo was not destructible.] Every policy of assurance expressly empowers the captain to "sue, labour and travel for, in and about the defence, safeguard and recovery of the goods" for the underwriters. That appears also from 2 Arnould on Insurance, s. 417, p. 1189, 2nd edition. [*Martin, B.*—Labouring for their safeguard and recovery is a very different thing from selling them.] There are several cases which shew that in case of abandonment the master becomes the *agent of the underwriters*: 2 Phillips on Insurance, c. 17, sect. 18, s. 1732 (d), *Columbian Insurance Company v. Ashby* (e), *Gardere v. The Columbian*

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(a) 3 B. &amp; C. 196.

mentaries, 331.

(b) 5 B. &amp; A. 617.

(e) 4 Peters' Supreme Court

(c) 3 Ch. Rob. 240, 259.

(American) Reports, 139.

(d) And see 3 Kent's Com-

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*Insurance Company (a), United Insurance Company v. Scott (b).* The ordinary and reasonable practice is for the captain to gather together the wreck of the undertaking and sell it. Suppose a ship is reduced to a congeries of timbers, it would not be reasonable that the captain should come home and tell the underwriters that each was entitled to a share. [*Martin, B.*—Your contention is that by the abandonment the master is relieved from what might have been a greater obligation to the owner of the cargo.] The agency of the master for the underwriters does not arise out of the contract, but is one created by the necessity of the case only. He is in the position of a person who, on an emergency and without communication with the owner, undertakes the guardianship of another person's property. He is like a *negotiorum gestor*, not bound to possess peculiar skill, or to undertake anything requiring peculiar skill, but only bound to act with good faith: Story on Bailments (*c*), ss. 189, 181, 182 a. Upon these principles, the captain was not bound to incur the expense of having the cargo watched through the winter. He would not have been justified in leaving it where it was, on the shore. The whole course of his conduct shews that he was acting in good faith, and in selling was adopting the readiest mode of realising the price of the cargo for the underwriters. Had it been feasible, he might have forwarded the goods. [*Martin, B.*—The power and duty of the master to tranship was much discussed in *Gibbs v. Grey (d)*.] The plaintiffs are only entitled to the price of the deals from Hans Clausen. If the goods could have been carried on there was no total loss. Now the abandonment, on which the plaintiffs found their title to sue in this action,

(a) 7 Johnson's (U.S.) Rep. 514.

(c) 5th edition.

(b) 1 Johnson's (U. S.) Reports, 105.

(d) 2 H. & N. 22.

assumes that there was a total loss, and consequently that the goods could not have been carried on. Yet it is contended that, for the purpose of limiting the extent of the captain's authority to deal with the goods, the plaintiffs are at liberty to say that there was no total loss. [*Martin, B.*—The underwriters and the assured have agreed to treat that which has taken place as a total loss. The master has nothing to do with the question whether the abandonment was rightful or not.]

The defendants are concluded by the proceedings in the courts in Norway. After full consideration of all the circumstances on the spot, the surveyors determined that a sale was the proper mode of disposing of the cargo. At the auction court it was formally decided that the sale should take place; and on an appeal from that decision to the proper Court at Trondhjem, in which it was prayed that the auction should be disavowed and the deals given up, the Court, on an elaborate review of the facts, confirmed the sale. No evidence has been given on the part of the plaintiffs that a ship or cargo may not be sold in Norway under such circumstances. This Court cannot sit as a Court of appeal from the diocesan court in Norway: it is bound by the judgment. In *Morris v. Robinson* (a) the sale had taken place by order of the Vice Admiralty Court, and the Court held that, as against the owners of the cargo, the sale was not valid; but it was not found as a fact that the Vice Admiralty Court had jurisdiction, and the Court could see that it had not. [*Pollock, C. B.*—If the decree for sale in that case had been by the Court of an independent kingdom, the effect might have been different.]

This Court will not try the validity of a sale of chattels decided to be valid by the Courts of the country where the

(a) 3 B. & C. 196.

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sale took place (a). A sale in market overt of the goods of a foreigner in this country would bind the property in the goods. No greater effect is given to the sale by the Norwegian court than would be given by our own Courts to such a sale. If valid in Norway, by the Law of Nations the sale is valid everywhere: Story's Conflict of Laws, s. 242. True it is that in the same work, ss. 383, 384, it is said that a contract, good according to the law of the domicile of the owner, will be good wherever else the property may be situate, but that does not imply that a contract, valid according to the law of the country where the goods are, will not be binding also. [*Pollock*, C. B.—If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere. *Martin*, B.—The argument is that, supposing the goods of an Englishman to be taken to a foreign country, and sold there by the person in whose hands they are, if by the law of that country a sale by a person in possession without title is valid, and the goods are afterwards brought here, the English owners cannot retake them. There is a distinction between this case and one where an English owner entrusts his goods to a factor abroad, who wrongfully sells them. In that case, perhaps, it may be presumed that the agent has all the authority which the law of the country where the goods are would give him.]

The plaintiffs are not entitled to recover interest in addition to the 1400*l*. [*Pollock*, C. B.—Interest is not recoverable in trover.]

*Hill*, in reply.—The cases establish beyond question that a master cannot sell except in case of urgent necessity. There is no distinction, as to his power, whether he is acting

(a) On this point he referred to Story, Conflict of Laws, s. 286 c, and note, *Ib*.

for the interest of the shipper or of the underwriter. In Story on Agency, s. 118, it is said :—" In cases of an abandonment by the owner of ship or cargo to the underwriters for a total loss during the voyage, the master becomes the agent of the underwriters, by operation of law, with the same general rights and authorities as he would have in regard to the owner" (a). There is no authority for the position that his powers are enlarged by the abandonment. The clause in the policy that he may sue, labour and travel for the underwriter does not empower him to sell the goods. The effect of the abandonment is, that the underwriter is subrogated into the place of the owner of the goods. Subrogated is a term taken from the civil law, meaning put into the place of another for the purpose of suit. If the owner could have maintained trover for the timber after the abandonment, the plaintiffs became entitled to do so. Notice of abandonment was given on the 4th of October; the sale did not take place till the 15th. Therefore that which was abandoned was the timber, and not merely a debt from Hans Clausen. Whether the loss was in reality total, and the abandonment properly made, is merely a question between the owner of the cargo and the plaintiffs, with which the defendants have no concern. The plaintiffs were not bound to have disputed it, and did not choose to do so.

The evidence establishes these propositions: First, that there was no necessity for the sale; secondly, that a prudent owner would not have sold; and, thirdly, that the sale took place before any communication by the master with the owners of the cargo. It is clear, therefore, that if the case had rested there, the sale would have been unjustifiable, and no property would have passed to the vendee. But then it is said, that by the law of Norway the property

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(a) Citing *The General Interest Insurance Company v. Ruggles*, 12 Wheaton's (U. S.) Reports, 408; per Thomson, J., Ib. 414.



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passed. The evidence, however, shews that a sale is only justified by necessity. Then reliance is placed on the judgment of the Court in Norway. But neither the plaintiff nor the defendants were parties to that proceeding. Now, one of the first principles of law is, that to render a foreign judgment operative in this country, the party against whom it is given must have had notice of it, and an opportunity of being heard. The cases, indeed, have arisen on judgments in personam, but there is no reason why the same principle should not apply to judgments in rem. The subject is fully discussed in 2 Smith's Lead. Cas. 634. Moreover, a judgment of this kind is not an estoppel unless it is pleaded as such: if the party who relies on it neglects to plead it, the Court are at liberty to examine into the grounds of the judgment. (*Wilde* referred to *Sanderson v. Collman (a)*.)

*Cur. adv. vult.*

The judgment of the Court was now delivered by

MARTIN, B.—This was an action of trover, and the pleas are, not guilty and not possessed. There were also the indebitatus counts and a plea of never indebted. The cause came on for trial before the Lord Chief Baron; but it was agreed to frame a special case for the opinion of the Court, who are to form a judgment as well upon the facts as the legal result arising upon them.

The plaintiffs are the underwriters upon a cargo of deals shipped on board a Prussian vessel called the "Augusta Bertha," at Onega, in Russia, for Messrs. Simpson & Whaplate, of Hull. The bill of lading was signed by the master Michaelis, and was in the usual form, declaring the deals to be deliverable at Hull. The vessel set sail, and on the

(a) 4 Man. & G. 209.

17th September went ashore near a place called Molde, in Norway. On the 23rd of September the master Michaelis addressed the following letter to Messrs. Simpson & Whaplate:—(His Lordship read the letter of the 23rd September, 1852, ante, p. 619.) Upon the receipt of this letter on the 4th of October, Messrs. Simpson abandoned the cargo to the plaintiffs, the underwriters, and they, upon the 14th of December, accepted the abandonment, and paid as for a total loss, and the bill of lading was indorsed and delivered by Messrs. Simpson & Whaplate to them.

Before the receipt of any answer to this letter, the master Michaelis employed Mr. Width to act as his agent, and he, on the 22nd of September wrote to a Mr. Delphin, who is styled the “Sheriff” and “Director of Auctions,” to appoint a time for holding an act of survey, estimate and investigation of the ship and her cargo; and to a Mr. Wetlesen, the bailiff, to nominate and appoint surveyors. An act of survey was appointed for the 27th of September, and surveyors named. The act was accordingly held, and the surveyors recommended, as best for all parties concerned, that the rest of the cargo then on board should be discharged, and the whole sold by public auction. On the 30th of September Michaelis and Width made a requisition to the sheriff to have both ship and cargo sold, and in a postscript it was stated that, it was hoped the sheriff would appoint the sale to be held on the 13th of October at the latest. The sale was appointed to be held on the 15th by Mr. Delphin; but upon that day, before any sale took place, a Mr. Jervell came forward in the transaction, and produced a letter which he had received the evening before from Messrs. Fraser, Redman & Co., of London, who acted on behalf of the underwriters on the ship and freight. It was dated the 2nd of October, and is as follows:—(His Lordship

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read the letter, ante, p. 621.) This letter was translated by a Mr. Hans Clausen, the British vice consul of Christiansand to the parties present, including the master of the ship and the auctioneer, and Mr. Hans Clausen stated that he had also received a letter from a Mr. Moor, of London, the secretary to an insurance Company, stating that the cargo was insured, and requesting him to demand the delivery of the cargo on payment of the expenses, and that the bill of lading which (it was said in the letter) there was not then time to procure from Hull, and a formally attested power of attorney, should be forwarded to him by the next post. The master, Michaelis, then declared that he had no acquaintance with Messrs. Fraser, Redman & Co., and that he therefore would take no notice of their letter, but would act for the interest of all concerned as far as lay in his power. Mr. Hans Clausen stated that as the writer of the letter to him (Mr. Moor) was totally unknown to him, and the promised power of attorney had not made its appearance, he was unable to take any step; but as he was fully convinced that every thing had been done for the interest of the persons concerned, he would only reserve the right of all. Mr. Jervell protested against the sale both of ship and cargo being proceeded with. The sale, however, afterwards did proceed, and both ship and cargo were sold, and the cargo was bought by the same Mr. Hans Clausen for about £, sterling.

On the 12th of October, Messrs. Simpson & Whaplate addressed the following letter to the master Michaelis, which enclosed one from Mr. Park, the agent of the underwriters on cargo. (His Lordship read the letters dated 12th October 1852, see p. 620.)

These letters were not received by Michaelis until after

the sale had taken place. Some time afterwards Mr. Jervell instituted a suit in the superior diocesan Court of Trondhjem, against Michaelis the master, Width his agent, and Hans Clausen the purchaser of the cargo, and on the 28th of November, 1853, a judgment was given. This judgment is a long document (D. D. in the Appendix), and therein Mr. Jervell is stated to have prayed to the Court by his suit, that *the public auction should be disavowed, and that Mr. Clausen should be bound either to deliver up to the underwriters the cargo of fir planks in naturâ which he had bought, and if this could no longer be done, to make compensation for the loss and damage.* It contains, apparently, an accurate statement of the facts and much reasoning upon them, and the formal judgment was "that the public auction was held to be confirmed."

In April, 1853, the deals arrived in the Thames, consigned to the defendants, who had made advances upon them to Mr. Hans Clausen, and on the 15th the plaintiffs gave a written notice of the circumstances of the sale, and demanded the deals to be delivered up to them. The defendants refused to deliver them up, and afterwards sold them, and they produced net 1470*l.* 4*s.* 2*d.* The present action is brought to recover this sum. The plaintiffs have done nothing to confirm or adopt the sale of the deals in Norway.

This case was argued before us by Mr. *Hugh Hill*, on behalf of the plaintiffs, and Mr. *J. Wilde*, on behalf of the defendants.

The first point contended for by Mr. *Hill* was, that assuming the law of England to be applicable, and that no proceedings had taken place in the Courts of Norway, the sale of the deals was unjustifiable and without authority, and that no property in the deals passed to Mr. Clausen,

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the vendee. Upon this point some cases were cited, but it is not necessary to refer to them as it is perfectly clear there was no necessity to justify the sale. A master is an agent to carry and convey, not to sell, and it is only in cases of absolute necessity that he can sell either by the law of England or the general maritime law. (See the case of *The Gratitude* (a).) Here there was no necessity whatever; the goods were not perishable, there was apparently no want of funds, and the owners could have been and were easily and readily communicated with. There is, therefore, no pretence for saying there was any necessity for the sale, much less an absolute necessity; and had the case rested upon this point we should have been clearly of opinion that according to the law of England no title vested in Mr. Clausen by the sale, and that the title of the defendants was not better than his.

The second point made was as to the right of the plaintiffs to sue in this action. It was contended, by Mr. Hill, that upon the acceptance of the abandonment its operation was retrospective, and the title of the plaintiffs to the deals had relation back to the time of the alleged loss, and it seems clear that it is so: (Arnould on Insurance, p. 1178, Article 408 (b), and the note there.) The case cited by Mr. Hill from the Court of Errors of New York, *Robinson v. The United Insurance Company* (c), is not mentioned by Mr. Arnould in his first edition, but it is in conformity with the law as stated by him; and although it seems the point has never been directly decided in England, we think the law is as contended for by Mr. Hill, and that the title of the plaintiffs to the deals had relation back to a time anterior to the sale to Mr. Clausen. The plaintiffs, therefore, are the proper parties to maintain this action.

(a) 3 Rob. 240, 259. (b) s. 413, second edition.

(c) 1 Johnson's (U.S.) Rep. 592.

But it was argued, by Mr. *Wilde*, that the abandonment not being accepted until after the sale, the underwriters were bound to take the subject of abandonment as it then was, viz. the debt from Mr. Clausen, for the price. But we think this is not so; and that they obtained a title to the goods themselves in the state and condition in which they were at the time of the loss, and that they are not of necessity bound by the intermediate act of the master.

We also think that the propriety of the abandonment, and whether or not Messrs. Simpson could have insisted upon it had the plaintiffs objected, is a question entirely between the assured and the underwriters, and with which the defendants or Mr. Clausen have nothing to do.

The next point argued was, what is the law of Norway upon such a sale as the present? and if it be at variance with the law of England, is it binding upon an English owner? There was a great deal of evidence as to the law of Norway; and, undoubtedly, it seems to be the opinion of several of the gentlemen who were examined, that by it a sale by the master of the ship transfers the property to the purchaser, and that the owner must look for whatever remedy he may have to the master; and the question, in the event of this law differing from that of England, which law should prevail, is one of very great difficulty.

We think, however, that the case must be decided upon the judgment in the superior diocesan court of Trondhjem, and that it is not necessary for us to express any opinion on the point. After much consideration, we are of opinion that the parties to this suit are concluded by the judgment of that Court.

It is clear that Mr. Jervell was the agent of the plaintiffs in instituting the suit, and as against them the Court must be taken to have had jurisdiction,—indeed there is no evi-

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dence that it had not. The defendants are the consignees of the deals from Mr. Hans Clausen, and are defending the present action upon his right and title. We, therefore, think that the parties to the present action were privies to the suit in Norway. The remedy sought was in the nature of one *in rem*, viz., that the auction should be disavowed and the deals delivered up in specie, if it were possible to do so. The judgment was, that the public auction was to be confirmed.

This seems to us to be in the nature of a judgment *in rem*, and such a judgment finally determines the question.

The law upon the subject will be found in Mr. Smith's note to *The Duchess of Kingston's case*, 2 Smith's Leading Cases, 439 (a). The judgment of the superior diocesan Court, in substance, was that the sale was valid and the property in the deals passed; there is, therefore, an adjudication upon the status of the thing adjudicated upon, and this seems to us to conclude all parties and privies to the suit from saying that the status is not such. It is similar to the condemnation of goods in the Exchequer and the sentence of a prize court, both of which are conclusive as to the ownership of the goods or ship. It was said by Mr. Hill that this judgment could be avoided for fraud. This is so if there were fraud found to affect it, but there is none. It is impossible to say there was any fraud in the Court. Indeed we see no reason to believe that the judge was not perfectly *bonâ fide*. If the defence to the suit, by the master or his agent and Mr. Clausen, can be said to be fraudulent, that is not the species of fraud to affect the judgment. Such fraud must be a fraud in the procuring of the judgment, such as collusion or the like, or fraud in the Court itself.

It was also said that the judgment ought to have been

(a) Second edition, p. 311; page 612, fourth edition.

pleaded. But this is not so. If it be a judgment *in rem*, it is conclusive evidence upon the plea that the goods were not the plaintiffs', and there is no necessity to plead it.

But, assuming that the judgment is not one in the nature of a judgment *in rem*, it seems to us nevertheless it must be taken as conclusive. The plaintiffs thought fit to seek their legal remedy in what must be taken to be a foreign court of competent jurisdiction, and judgment has been given against them. We think they are conclusively bound by it. "*Interest reipublicæ ut sit finis litium.*" If a plea were necessary we should permit an amendment. In the present state of the law it would be almost imperative upon us to do so. In our judgment, however, the proceeding is in the nature of one *in rem*, and no plea is necessary.

It is observable that this judgment was given in November 1853, after the conversion, but we think this immaterial.

In our opinion its real operation is a conclusive adjudication upon the validity of the sale whereby the transaction has passed *in rem adjudicatam*, and all controversy upon it ended as between parties and privies to the suit.

Verdict for the plaintiffs to be set  
aside, and a verdict entered for  
the defendants.

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Plaintiff, a workman, employed with others in sinking a pit, being at the bottom, was injured by the fall of a tub of water which was being drawn up by machinery. Evidence was given that the tackle was improper, not being fitted with a safe hook, and that a jiddy should have been used. The plaintiff worked with the hook making no complaint of it. A jiddy had been provided by the master, who had directed that it should be used when earth was raised. The plaintiff, in his master's presence, had complained that the jiddy was not used for water. The master was at the workings

several times each day.—*Held*, that the master was not liable; first, because, assuming the injury to have arisen from the defect of the hook, the workman himself voluntarily used it, and it was not shewn that the injury was not caused by his own rashness. Secondly, because, assuming it to have arisen from the neglect to use the jiddy, the master, having provided a proper apparatus, was not liable for the neglect of the plaintiff's fellow workmen in omitting to use it.

THE declaration stated that the defendant, before and at the time of the committing of the grievances &c., was making and sinking a certain shaft, and was possessed of a certain barrel then by the defendant used for drawing water out of the said shaft, which said barrel was then under the care and management of the defendant and certain other servants of the defendant; and, before the committing of the said grievances, the plaintiff had contracted with the defendant to do work for the defendant in and about the sinking of the said shaft; and in performance of that contract was, at the time of the committing of the said grievances, lawfully and by the permission of the defendant in and at the bottom of the said shaft: Yet the defendant, not regarding his duty in that behalf, by himself and his servants in that behalf, took so bad and such little care of the said barrel, and conducted himself by his said servants so negligently in the management thereof when using the same as aforesaid, *and the defendant found and provided, and knowingly used and allowed to be used in and for the purposes aforesaid, such insufficient and improper machinery, implements and matters, and such insufficient, improper and unfit processes and modes for the purpose aforesaid* (a), that, by reason of the premises and of the said negligence and improper conduct of the defendant and his servants in that

(a) The words in italics were in pursuance of leave to amend not in the declaration as originally drawn, but were inserted given at the trial.

behalf, the said barrel fell down the said shaft and struck the plaintiff with great violence, and greatly injured the plaintiff, and the plaintiff was thereby knocked down, greatly hurt, permanently lamed, &c.

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Pleas.—First: Not guilty. Second: That, before and at the time of the committing of the supposed grievances, the plaintiff was the servant of the defendant, working for certain wages &c., and that, at the said time when &c., the plaintiff was in and at the bottom of the said shaft in the performance of his duty as such servant and not otherwise howsoever; and that the plaintiff never contracted with the defendant to work for the defendant in or about the sinking of the said shaft, or otherwise, save to work for the defendant as such servant as aforesaid, at wages as aforesaid.—The plaintiff took issue on this plea.

At the trial, before *Byles, J.*, at the Liverpool Spring Assizes, it appeared that the plaintiff was a mine sinker employed by the defendant to assist in sinking a shaft or coal pit belonging to the defendant at Hindley, near Wigan, in Lancashire, at daily wages. On the 7th of October, 1857, he was at work at the bottom of the shaft, part of his duty being to assist in filling tubs with water and earth, which, being attached to the rope by the plaintiff himself or his fellow workmen at the bottom, were drawn up to the top by the rope, which ran over a pulley above the mouth of the pit. The following is the mode in which the tubs are raised.—The tub is attached to the rope by hooks; the tub is then raised a few feet, and if, on being tried, it is found to be securely hooked, the man at the bottom of the pit cries out “all right,” and upon that it is wound up. It was alleged to be the duty of the banksman, when a tub arrives a little above the surface of the ground, to place a jiddy or slide so as to prevent it from falling back when unhooked from the end of the rope. The defendant was in

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the habit of coming to the workings several times in the course of the day. He had provided a jiddy, and directed that it should be used when earth was brought up, but not for water. The defendant had employed a competent banksman. On the occasion in question the plaintiff had assisted in filling a tub with water. The tub, having been drawn up to the surface to be emptied, fell from the top upon the plaintiff and injured him. Evidence was given that the jiddy ought to have been used for water as well as earth, and that the hook for attaching the tub to the rope was dangerous, not being fitted with a spring, or sufficiently long. It was suggested that the accident had arisen from the want of a jiddy and the defective hook, the tub having become released from the hook before it was properly landed. The plaintiff knew the hook which was used and had made no complaint of it, but he had complained, in the defendant's presence, that the jiddy was not used for water. Other workmen had complained of the danger of working in the pit with the tackle used.

The learned Judge told the jury that the defendant was not liable if the accident was occasioned by the negligence of the plaintiff or his fellow workmen, but that they might find the defendant guilty if they thought that it was caused by the improper omission to use a part of the machinery, if such omission existed by the defendant's order or with his sanction: in other words, that the defendant was liable if the accident was occasioned by an improper and dangerous process habitually used by him or with his sanction. The jury found a verdict for the plaintiff.

*Monk*, in Easter Term, had obtained a rule nisi for a new trial on the ground of misdirection in this: that the learned Judge ought to have told the jury that, if the plaintiff knew that the machinery employed was insufficient, or that the course of practice pursued was unsafe, and, not-

withstanding such knowledge, continued in the defendant's employment, he could not recover; or why the judgment should not be arrested.

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*Knowles* and *Milward* shewed cause (a).—The defendant was guilty of personal negligence in providing improper machinery, which was used under his direction after he had notice that it was unsafe. In *Roberts v. Smith* (b), a labourer was examining the put-logs of which the scaffold was to be built, when the defendant, the master, stopped him, and told him not to break any more; though in building the scaffold the labourer used only such materials as he thought sufficient: it was held that there was evidence to go to the jury of the master's negligence, upon which they might find for the plaintiff. There the act which immediately caused the accident was that of the plaintiff's fellow servant. That case was not so strong as the present, because here the master had *express* notice of the dangerous character of the *particular* machinery which was to be employed. Knowing the danger he ordered the jiddy to be used for earth only. In *Paterson v. Wallace* (c), it was laid down that "it is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure when, in fact, the master knows, or ought to know, that it is not so. And if from any negligence in this respect damage arises, the master is responsible." The plaintiff seeks to make the defendant, his master, responsible, not for any negligence of his fellow servants, but for the defendant's own neglect in not providing a proper hook. If a rule is to be laid down that a servant shall not recover against his master for an accident occa-

(a) In Trinity Term, June 3.  
 Before *Pollock*, C. B., *Martin*, B.,  
*Watson*, B., and *Channell*, B.

(b) 2 H. & N. 213.  
 (c) 1 Macqueen, 748, 751.

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sioned by the master's wilfully neglecting to provide safe tackle for the use of his servants, or recklessly directing the use of that which he knows to be unsafe, because the servant may have suspected the tackle to be unsafe, it will be productive of great hardships in practice. The plaintiff here was a collier, and therefore subject to the provisions of the 4 Geo. 4, c. 34, s. 3. Suppose that, considering the machinery unsafe, he had chosen to quit his service, he might have been compelled by the magistrates to have returned to his work, and punished by imprisonment for quitting his employment, unless he could have shewn to their satisfaction that the machinery was obviously unsafe and insufficient. It cannot therefore be laid down as a rule that, in continuing to work under such circumstances the servant voluntarily undertakes the risk arising from the master's recklessness or negligence.

*Monk and Parker*, in support of the rule.—First, as to the alleged neglect in not causing the jiddy to be used. The master had provided a proper jiddy, and had employed competent workmen, who might have used it. He had therefore done all that the law requires a master to do. [*Martin*, B.—I think that he ought to have insisted on the jiddy being used for water. He gave orders to the banksman to use the jiddy for earth.] The principle is well established that a servant undertakes the risks incident to his employment, and cannot turn round and sue his master for an accident occasioned by the risk he has so undertaken. Thus, in *Priestley v. Fowler* (a), the master was held not responsible for an accident to his servant arising from a defect in the construction of a van, which, being overloaded, broke down. [*Pollock*, C. B.—No doubt it is rather the business of a coachman than of the master to ascertain the state of the vehicle he drives. Suppose the wheel of a carriage is

(a) 3 M. & W. 1.

defective, and the master observes it and expresses his opinion about it; if, after that, the servant chooses to drive, he would take his risk with his master.] In *Assop v. Yates* (a) the master was held not liable, for the reason, amongst others, that the servant, after having complained of the hoarding, voluntarily continued at work. In *Shipp v. The Eastern Counties Railway* (b) a similar point was decided: there the learned Judge said that the defendant was liable if the accident was occasioned by an improper and dangerous practice habitually used by him and with his sanction. Now in *Dynen v. Leach* (c) *Bramwell*, B., said, "there is nothing legally wrongful in the use, by an employer, of works or machinery more or less dangerous to his workmen, or less safe than others that might be adopted. It may be inhuman so to carry on his works as to expose his workmen to the peril of their lives, but it does not create a right of action for an injury which it may occasion when the workman has known all the facts, and is as well acquainted as the master with the nature of the machinery, and voluntarily uses it." In the present case the learned Judge's direction was defective in not adverting to the fact that the plaintiff had notice of the danger. [*Pollock*, C. R.—If there is a dangerous process which is convenient to the workmen the master is not bound to compel them to use a safe one. They may for their mutual convenience incur the greater risk.] The remarks of Lord *Cranworth*, in *Paterson v. Wallace* (d), apply only to a case where the servant has no notice of the danger he is incurring. The fact that the jiddy was not used by the banksman was a species of risk which a servant undertakes as one of the risks of his service: *Wiggett v. Fox* (e). One of the

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(a) 2 H. &amp; N. 768.

(d) 1 Macqueen, 748.

(b) 9 Exch. 223.

(e) 11 Exch. 882.

(c) 26 L. J., Exch. 221.

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reasons which induced the Court to hold the defendant not liable in that case was that, from the nature of things, a workman is just as likely to be acquainted with the risks he runs as the employer. *Hutchinson v. The York, Newcastle and Berwick Railway Company* (a) is to the same effect. As to the defect in the hook, the plaintiff was the person who himself attached the bucket to the hook, and though he had complained of the insecurity of it, he did not quit his employment but voluntarily took his chance of what might happen.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

WATSON, B.—This is an action to recover damages for an injury sustained by the plaintiff. The circumstances were these: the plaintiff was a mine sinker, and was, together with several other workmen, employed by the defendant in sinking a coal pit in Lancashire. The plaintiff was at work at the bottom of the pit, and had assisted in filling a tub with water, which was drawn up to the top to be emptied. Owing to something which occurred at the top, where other workmen were employed to empty it, the tub fell down the pit and injured the plaintiff.

The cause was tried before my brother *Byles* at the last Liverpool Assizes, and a verdict found for the plaintiff, and a rule was obtained for a new trial, which has been argued before us. On the argument, it was admitted by the learned counsel for the plaintiff, that it has now been settled, by all the Courts at Westminster Hall, that a master is not responsible for an injury sustained by a servant for the mere negligence of a fellow servant engaged in the same employment; but the Court of Exchequer Chamber, in *Roberts v. Smith* (b), has decided that it is the master's

(a) 5 Exch. 343.

(b) 2 H. & N. 213.

duty, when he personally interferes, to take care to provide that the tackle and apparatus supplied by him is proper and secure, and that he is liable for damage caused by want of due care in this respect. The same principle was laid down by the House of Lords in *Paterson v. Wallace* (a), as existing in the law of Scotland, and it was sought to bring the present case within it by two circumstances.

First, evidence was given that the hook by which the barrel was attached to the tackle which drew it up was not safe; that it ought to have been a spring hook, which it was alleged would have prevented the misfortune which led to the accident. The answer to this seems to us to be, that the plaintiff himself knew the hook which was used, and worked with it himself, possibly attached it to the tub or barrel which afterwards fell upon him, and seems never to have made any observation or complaint in respect of it. We think that a servant so acting cannot maintain an action against his employer. He himself was contributory to the injury, and, as it was stated by Lord *Cranworth*, in the case in the House of Lords, it is essential for the plaintiff or pursuer to establish that the injury arose from no rashness of his own.

The second circumstance relied on was, that an apparatus called a jiddy was not used. It was proved that the defendant had supplied a jiddy for the purpose of being placed over the top of the pit where the tub was emptied; and the workmen at the top used it when soil or earth was brought up, but not when water was raised out of the pit. It was proved also that the defendant was in the habit of coming to the place where the pit was sinking several times daily. We think that the defendant is not rendered liable by these circumstances. He supplied a proper apparatus. The defendant's fellow workmen neglected to use it; there was no evidence that the defendant gave any direction whatever to

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(a) 1 Macqueen, 748.



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this effect; and it seems to us, that to hold the defendant liable, would be to utterly fritter away the rule that the master is not answerable for an injury caused to one servant by the negligence of another. In the case of *Vose v. The Lancashire and Yorkshire Railway Company* (a), this Court expressed an opinion that extreme caution should be used not to relax the rule, and to this we adhere. We therefore think that the rule must be absolute for a new trial.

Rule absolute (b).

(a) 2 H. & N. 728. 734.

(b) See *The Bartonshill Coal Company v. Reid*, 3 Macqueen, 266.

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PENNINGTON and Others v. CARDALE and Others.

Leases granted by deans and chapters for long terms of years, not in conformity with the disabling and restraining statutes, are not void but voidable only.

P., a lessee, being in possession, and the dean and chapter of C. being possessed

**EJECTMENT** to recover possession of a house and piece of land in St. Mary, Newington, parcel of the manor of Walworth.

At the trial a verdict was taken for the plaintiff, subject to the opinion of the Court on a special case to be settled by an arbitrator. The case was in substance as follows.—

At the time of the making the lease next mentioned, the Dean and Chapter of Canterbury were seized in fee of the manor of Walworth. By lease of the 27th of June, 1771,

of the reversion expectant upon his term, of the manor of W., in June 1786 granted certain building leases for 99 years, from Michaelmas 1786, of certain premises, part of the manor, at several yearly rents of 14*l.*, payable to the dean and chapter and P. respectively. Rent was regularly paid to and accepted by successive deans down to 1856. In 1849, on the surrender by the plaintiffs of the existing lease of the manor, the dean and chapter re-demised the manor for 21 years to the plaintiffs, "except and reserved out of this demise unto the said dean and chapter and their successors, all such rents and sums of money and other right and interest, benefit and advantage, which hath been or are, or shall be reserved to them in and by any building leases for long terms of years of any part of the several lands and tenements hereby demised," &c. "to have, hold, occupy and enjoy the site and courtlodge and all other the premises with the appurtenances, except as before excepted, and subject to the building leases."—*Held*, that the demise to plaintiffs was subject to all leases de facto granted, and that the plaintiffs did not acquire any right to avoid the building lease of 1786.

*Semble*, that the premises comprised in the building lease of 1786 were excepted out of the lease of 1849.

the Dean and Chapter demised to H. Penton the manor of Walworth, including the property claimed in this action, for 21 years, at the rent of 28*l.* 8*s.* 4*d.*, payable half yearly.

An act of parliament was passed in 1774 entitled "An Act for enabling the Dean and Chapter of Canterbury, H. Penton and T. Brandon to grant building leases, pursuant to two several agreements entered into for that purpose. After reciting the lease of June 1771, an agreement dated the 23rd of February, 1773, between the Dean and Chapter and H. Penton; a lease, dated November, 1773, from the Dean and Chapter to Thomas Brandon of other portions of their property at Newington not included in the lease to H. Penton, and an agreement between the Dean and Chapter and Thomas Brandon, dated the 3rd of December, 1773: and that it was desirable that the agreements should be carried into effect, which by reason of the disabling statutes passed in the reign of Queen Elizabeth could not be done: the Act provides that from May, 1774, the agreements should be confirmed; and that it should be lawful for the Dean and Chapter and their successors, and the said H. Penton, his executors, administrators and assigns jointly, and also for the said Dean and Chapter and their successors, and the said T. Brandon, his executors, administrators and assigns jointly, and they severally were empowered, notwithstanding any statutes then in force, from time to time by indenture to make any leases of all or any part of the lands, &c., to Penton and Brandon respectively demised, to any person or persons for any term of years not exceeding 99, to take effect in possession and not in reversion or remainder or by way of future interest, for the purpose of making any new buildings, &c., at the best and most improved yearly rent, &c., without taking any fine or sum of money; &c., for the making of such lease, and so as the rent be reserved quarterly, and that one

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moiety of the rent to be reserved in respect of the premises so demised to H. Penton or any part thereof, during the continuance of the term to be granted of the said premises, be made payable to the Dean and Chapter and their successors, and that the other moiety of the rent to be reserved in respect of the said premises so demised to H. Penton be reserved to H. Penton, his executors, &c.

The Act then contains similar provisions as to the reservation of rents in leases to be granted by the Dean and Chapter and Thomas Brandon, of portions of the land comprised in his demise.

Then follow certain restrictions as to all leases to be granted under the Act, namely: "and so as all and every such lease &c. be under the following restrictions, that is to say; that no such lease shall be valid unless there shall be therein contained a condition of re-entry on non-payment of the rent, and unless the lessee to whom such lease shall be made execute a counterpart, and covenant for the payment of the rent to be thereby reserved, and to build and keep in repair the buildings intended and agreed to be built by such lease, and so as there be contained in such lease all such conditions, covenants, &c., on the part of the lessee, as are usual or proper in such cases."

A copy of the Act accompanied the case and was taken as part of it.

By lease of the 25th of June, 1785, the Dean and Chapter, upon surrender of the prior lease, again demised to H. Penton the premises comprised in the lease of the 29th of June, 1771, for 21 years, from Midsummer day then last past.

By indenture, 26th of June, 1786, between the Dean and Chapter and Penton of the one part, and Thomas Clutton of the other part; after reciting the said act of parliament: it was witnessed, that by virtue of the powers

vested in the Dean and Chapter by the said Act, and also in consideration of the rents and covenants, &c., on the part of Clutton, &c., and of the costs and charges that Clutton had been at in building the messuages thereafter mentioned; the Dean and Chapter and Penton, and each of them, did demise &c., to Clutton, certain parcels of ground in Newington, together with such messuages as were then erecting, or which should be erected during the demise upon the said land, &c : Habendum to T. Clutton, his executors, &c., from Michaelmas day then next for 99 years, yielding and paying to the Dean and Chapter and their successors the yearly rent of 14*l*.; and yielding and paying unto Penton, his executors, &c., the like yearly rent or sum of 14*l*. The lease contained a proviso for re-entry on non-payment of the several rents.

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The lessee duly executed two counterparts thereof, and thereby covenanted with the Dean and Chapter and Penton severally, &c., for payment of the rents, to keep in repair, to pay taxes, &c., and to deliver up in repair, &c. There was no express covenant on the part of the lessee to build.

The premises leased to Thomas Clutton by the indenture of 1786 were part of the manor of Walworth, and comprehended the premises claimed in this action.

Twenty-five building leases of other parts of the manor, not comprised in the said lease to Clutton of 1786, were granted by the Dean and Chapter and Penton between the passing of the said Act and the 25th day of December, 1788, the date of the assignment hereinafter mentioned. Seventeen of these leases were free from objection: eight were subject to the same objection as that in the present case; and five of these eight have been confirmed by acts of parliament (a).

(a) 45 Geo. 3, c. cxv.; 12 & 13 Vict. c. iv.

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Under the said indenture of 26th June, 1786, Clutton entered and built upon the premises the house sued for; and he and his assigns and under-tenants have ever since been in possession. Clutton and his assigns paid the rent of 14*l.* to the Dean and Chapter down to the 25th of March, 1856, when the last payment of the rent was made; and the rent so paid to the said Dean and Chapter has always been accepted as such rent by them, and written receipts have been periodically given by the said Dean and Chapter in the following form; viz.—

“Received the                      day of                      of                      the sum of 7*l.*, being half a year's rent due to the Dean and Chapter of Canterbury at                      last under lease to T. Clutton, 26th June, 1786.”

Clutton and his assigns also paid the rent of 14*l.*, reserved by the last mentioned indenture to Penton, till 1801, when Penton assigned the rent of 14*l.* to George Hurt, who was at that time assignee of the lease to Clutton of June, 1786.

The said lease of June, 1786, to Clutton was, on 23rd October, 1786, assigned to George Hurt, who died in 1830, leaving G. B. Hurt his executor, who died in 1853, leaving the defendants his executors, who thereby became entitled to the term, if any, subsisting under the lease of 1786.

By indenture of December, 1788, Penton assigned to Samuel Brandon and Thomas Brandon, as tenants in common, the premises demised to him by the lease of 1785 for the remainder of the term, expressly excepting the premises comprised in the lease of June, 1786, to Thomas Clutton, and also all the premises comprised in the other building leases.

On the 28th of November, 1789, upon surrender to Penton of the lease of June, 1785, the Dean and Chapter demised the manor of Walworth, by the same description as in the lease of 1771, to Samuel Brandon and Thomas Brandon for seventeen years from Midsummer, 1789.

Thomas Brandon died in 1796, and Samuel Brandon in 1819. All the leases of the manor, granted after the deaths of Thomas Brandon and Samuel Brandon, were granted to the trustees under the wills of Samuel Brandon and Thomas Brandon respectively. The plaintiffs in this action are the trustees under such wills, and are the surviving lessees under the lease of 1849.

By indenture dated the 11th of November, 1805, "in consideration of the surrender of a lease of the things thereby again in part demised, before that time made and granted by the said Dean and Chapter to Samuel Brandon and Thomas Brandon, dated the 28th of November, 1789," and which lease Samuel Brandon, Richard Brandon and John Carter did thereby surrender, the Dean and Chapter demised the manor of Walworth, "except as thereafter mentioned," to Samuel Brandon, Richard Brandon and John Carter for fifteen years from Midsummer, 1805.

This lease contained the following exception, which is also found in the previous leases of the said manor, viz. :—  
 "Except and always reserved to the Dean and Chapter and their successors all *rents of assize* belonging to the said manor, and the rents and other small farms before this time letten to divers persons, and all waifs, strays, felons' goods, and all other things which belong to the franchises and liberties of the said Dean and Chapter there." And the following further exception, which was not found in the prior leases of the said manor, viz. :—"And also *except and reserved out of this present demise unto the said Dean and Chapter and their successors all such rents and sums of money, and other right and interest, benefit and advantage, which hath been or are or shall be reserved to them in and by any building leases for long terms of years of any part of the several lands and hereditaments hereby demised heretofore granted by them in conjunction with the said Henry Penton.*"

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Successive surrenders and renewals of the lease of 1805 of the manor of Walworth were made by the Dean and Chapter and Samuel Brandon and the trustees, under the wills of Thomas Brandon and Samuel Brandon respectively, down to 1849, when the lease to the plaintiffs was granted. All these leases contain the same exceptions as the lease of 1805. At the date of the lease of 1805, and ever since, several building leases for long terms of years of parts of the manor of Walworth, at yearly rents, were subsisting.

On the 25th of March, 1856, the plaintiff gave the defendants notice to quit at Michaelmas, 1856. The Dean and Chapter did not concur in the notice. This action was commenced in October, 1856. G. Horne was Dean at the time of the granting of the lease to Clutton. New Deans were appointed in 1790, 1793, 1797, 1809, 1825, 1827 and 1845.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover. If the Court decide in the affirmative, the verdict is to stand for the plaintiffs. If in the negative, a verdict to be entered for the defendants.

*Joseph Brown* (with whom was *Lush*) argued for the plaintiffs (a).—It is admitted that the lease to Clutton was not a good execution of the power given by the Act of 1774: first, because it contains no covenant to build; secondly, because it was not to take effect in possession. Being for a term longer than that permitted by the 13 Eliz. c. 10, it was only good for the life of the Dean who granted it. The plaintiffs, being the lessees of the property comprised in it under a lease granted by a subsequent Dean, are entitled to put an end to the tenancy of the defendants. A lease by a Dean and Chapter not in

(a) In Trinity Term, June 8. Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Watson*, B.

accordance with the statute 13 Eliz. c. 10, is void against the successive Dean, and cannot be set up by the acceptance of rent by him: *Hunt v. Singleton*, referred to in *The Lincoln College Case (a)*, *Carter and Claycole's Case (b)*, Com. Dig. Estate (G. 5.). The only person who could set up this lease was the first Dean, for his life. In *Lyn v. Wyn (c)* *Bridgman*, C. J., held "that the acceptance of rent by a successor Dean shall not make good the lease, though it were by his deed: à fortiori by his bare receipt and acceptance of the rent." The same case is reported by the name of *The Dean and Chapter of Westminster's Case* in Carter's Reports (*d*), where it appears *Bridgman*, C. J., differed from his brethren in thinking that the lease might be set up by the acceptance of rent by the deed of the successor Dean and Chapter. The other Judges held that, being void, it could not be set up. In *The Dean and Chapter of Windsor v. Gover (e)* the point was raised that, in order to constitute a tenancy, the acceptance of rent by a corporation must be under seal. *The Mayor of Ludlow v. Charlton (f)* decided that the seal is "the only authentic evidence of what a corporation has done or agreed to do." *Rickman v. Garth (g)* shews that a lease by a Bishop contrary to 32 Hen. 8, c. 28, and 1 Eliz. c. 19, is not set up against the succeeding Bishop by the acceptance of rent under it. This lease would not have been good at common law because it reserves rent to H. Penton and his assigns for ninety-nine years, Penton having at the time a term of twenty-one years only.—On these points he further referred to *Doe d. Brammall v. Collinge (h)*, *Goodright, Lessee of Wynne, v. Humphreys (i)*, per Lord Ellenborough in *Roe d.*

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(a) 3 Rep. 60 a, and see note by Fraser, Ib.

(b) 1 Leon, 306. 308.

(c) Orl. Bridgm. 122, 149.

(d) Carter, p. 9.

(e) 2 Saund. 301, 305.

(f) 6 M. & W. 815. 823.

(g) Cro. Jac. 173.

(h) 7 C. B. 939.

(i) 1 Doug. 61, note 14.



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*Berkeley v. The Archbishop of Canterbury* (a), 4 Cruise's Digest, 70.

It will be contended, that the premises comprised in the lease to Clutton are excepted from the lease of 1849. But the exception in this habendum refers only to those leases which are good, of which there were many subsisting at the date of that lease. [*Bramwell*, B.—How can the Dean and Chapter get their rent if they have parted with the reversion expectant upon the lease to Clutton?] They may be entitled to it by contract. *Primâ facie*, the rent is incident to the reversion, but it may be severed from it by grant. In *Basset v. Lewis* (b), a grant of an advowson, after a previous grant void for uncertainty, was held to take effect immediately. As the present lease was void in point of law, the premises comprised in it cannot be deemed to be excepted from the lease to the plaintiffs of the whole manor. The plaintiffs therefore had a right to determine the defendants' interest by notice to quit, and they have done so.

*Creasy*, for the defendants.—In *Doe d. Pennington v. Taniere* (c), it was decided that at least a tenancy from year to year under the Dean and Chapter was created by the acceptance of rent. The rents under the building leases actually existing are excepted out of all the leases of the manor since 1805. The words of reservation in those leases cannot refer to the manorial rents, because there is a prior exception of them. (He was then stopped.)

*Brown*, in reply.—It would not have been necessary to except the rents, unless the reversion expectant on the leases passed to the plaintiffs. The fact, that the rents alone are

(a) 6 East, 86. 103.

(b) 1 Lev. 77.

(c) 12 Q. B. 998.

excepted, shews that the lease to the plaintiffs was intended to pass the reversion to them.

*Cur. adv. vult.*

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The judgment of the Court was now delivered by

MARTIN, B.—This is an action of ejectment to recover possession of a piece of ground, and a house erected thereon, parcel of the manor of Walworth in Surrey.

The facts are stated in a special case, and are substantially the same as those in *Doe d. Pennington and others v. Tanriere (a)*.

In this case, however, the plaintiffs had, on the 25th of March, 1856, given the defendants one half year's notice to quit, but the Dean and Chapter of Canterbury had in no way concurred in or sanctioned this step; on the contrary, they have always periodically received and accepted the rent or sum of 14*l.* a year, reserved to them by the building lease of the 26th of June, 1786, made to Thomas Clutton, under which the defendants claim title. This lease, although not the same as that in question in *Doe v. Tanriere*, is of the same date, between the same parties, and in the same form, and subject to the same objections.

The plaintiffs claim title under a lease, which was, in the argument, called the manor lease, bearing date the 18th of September, 1849, made between the Dean and Chapter of Canterbury of the one part, and the plaintiffs of the other part, and is for twenty-one years from Midsummer 1848, and will therefore expire at Midsummer 1869. It is the now existing lease, after a long series of renewals, of the manor of Walworth, made by the Dean and Chapter to the plaintiffs and their predecessors. The defendants claim title, as has been before stated, under the lease to Thomas

(a) 12 Q. B. 998.

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Clutton, dated the 29th of June, 1786. This lease was made in supposed pursuance of the powers conferred by an act of parliament passed in 1774, and was made between the Dean and Chapter and Henry Penton of the one part, and Thomas Clutton of the other part. It is in the same form as the lease to Thomas Clutton set out in *Doe v. Tanriere* (a). The premises demised were different; and the yearly rents respectively reserved to the Dean and Chapter and Henry Penton were 14*l*. It was admitted by the learned counsel for the defendants, as was done in the argument of *Doe v. Tanriere*, that the lease was not in accordance with the power, being dated in June 1786, but to commence and continue for 99 years from Michaelmas 1786, and therefore did not take effect in possession; but it was argued, first,—that, the present Dean having received the rent reserved to the Dean and Chapter, the lease became confirmed during his life; and secondly, that the plaintiffs had no power, by notice to quit, or otherwise, to determine this lease. By the lease to Clutton of the 26th of June, 1776, there was reserved to the Dean and Chapter and their successors, during the last 97 years of the lease, the yearly rent of 14*l*., and to Henry Penton, his executors, &c., the like yearly rent. The rent reserved to Penton became extinguished in 1801; but, as has been already stated, that reserved to the Dean and Chapter has been regularly paid to, and accepted by them, up to the time of the bringing this ejectment. It seems quite clear, from the authorities cited upon the argument, that this lease was not void, but voidable only. At common law the Dean and Chapter had the fee simple absolute; and the effect of the disabling and restraining statutes is to render leases granted not in conformity with them voidable, but not void. In 1849, therefore, when the last renewal was granted, the

(a) 12 Q. B. 998.

defendants, or persons then entitled under the lease to Clutton, held under a lease voidable by the Dean and Chapter. All previous interest of the plaintiffs had been put an end to and determined by their surrender of the preceding lease.

At the time of making the lease to Clutton, H. Penton held under a manor lease, dated the 25th of June, 1785, for twenty-one years from Midsummer Day then past. In the year 1805 a renewal of the manor lease was made, and there was inserted in it as follows:—"And also except and reserved out of this present demise unto the said Dean and Chapter, and their successors, all such rents and sums of money, and other right and interest, benefit and advantage, which hath been, or are, or shall be reserved to them in and by any building leases, for long terms of years, of any part of the several lands and hereditaments hereby demised, heretofore granted by them in conjunction with the said Henry Penton," or in conjunction with persons named Brandon, "or which have been, or shall be hereafter, granted by them the said Dean and Chapter in conjunction with Brandon or other the tenants or lessees of the said Dean and Chapter for the time being of the said estate in Walworth aforesaid." In the existing manor lease there are the same words; and the habendum is, "to have, hold, occupy and enjoy the site and courtlodge and all other the premises, with the appurtenances, except as before excepted and subject to the building leases so thereof granted or to be granted as aforesaid."

It was argued, on behalf of the plaintiffs, that the words in the habendum, "subject to the building leases," must be construed to mean subject to the interests lawfully created by them; but we think it extends to all leases *de facto* granted.

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It was argued that the plaintiffs, being leasees of the reversion, had all the reversionary rights, and among them that of avoiding this lease. Now, it is manifest that it was the intention of the parties, the Dean and Chapter and the plaintiffs, that the Dean and Chapter were to have, and continue to be entitled to, during the continuance of this manor lease, the rent of 14*l*. a year, and every other right and interest reserved to them by the building lease to Clutton of the 26th of June, 1786. But if the plaintiffs be right in their present contention, the consequence would be that the Dean and Chapter would be entirely deprived of their rent and every other right and interest reserved to them, and the plaintiffs would have possession of the premises now in dispute free from the obligation of the lease of 1786. This would entirely defeat the clear intention expressed in the existing manor lease. We think, therefore, that no such right as the plaintiffs claim was granted or assigned to them by the manor lease. If, as Mr. *Brown* contends, the right to avoid the lease of 1786 is annexed to and inseparable from the reversion, it would properly follow that the premises in question are not comprised in the manor lease; as otherwise the intention of the parties to it would fail. It is true that the premises in question are within the ambit of the parcels in the plaintiffs' lease; but that lease contains the exception of the rent of 14*l*. a year, and of every right, remedy, benefit, &c., including therefore rights of distress, rights of entry, rights of action for non-payment of rent and non-repair. It is clear that the plaintiffs could not, consistently with the terms and intent of their lease, accept a surrender from the defendants. It may be asked then what is granted to the plaintiffs in regard to the premises in question. Substantially nothing; for their term will expire before Clutton's. The way to

make the exception sensible (if Mr. *Brown* is right, that with the reversion the power to avoid the lease of 1786 must pass) is to hold that the premises in question are excepted; and this is consistent with other parts of the plaintiffs' lease; as, for instance, the covenant to repair, which also excepts these premises. It is not possible to suppose that the plaintiffs were to take these premises free from the obligation to repair. Indeed, that it was meant that the plaintiffs should have a power to avoid this lease, cause the rent reserved by it to cease, take the premises themselves, and pay no rent for them, cannot be pretended. At most it can be urged as a legal consequence of what has been done, though a consequence contrary to the intention of the parties. We think, however, for the above reasons, that it is not so, and that the defendants are entitled to judgment. This will secure to the Dean and Chapter the rent of 14*l.* a year, and will carry out the clear and manifest intention expressed by the parties, and effect real and substantial justice to all.

We express no opinion as to the other points argued before us, or as to the right of the Dean and Chapter at the expiration of the existing manor lease, assuming the present Dean to be then alive and in possession of the Deanery.

Verdict to be entered for the defendants.

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## IN THE EXCHEQUER CHAMBER.

*(Error from the Court of Exchequer.)*

June 19.

DENISON v. HOLIDAY and Others.

S. D., being reised in fee of four closes of land under which were mines of coal, in June, 1806, mortgaged in fee the lands and mines to T. T. to secure 550*l.* and interest. S. D. by her will, dated the 15th September,

THIS was a proceeding in error upon the judgment of the Court of Exchequer for the plaintiff on a special case. The case, and the judgment in the Court below, will be found 1 H. & N. 631.

The case was argued in Easter Term, May 12 (a), by

*The Attorney General* (with whom was *Cleasby*), for the defendants (the appellants); and

1809, devised to her seven children, as tenants in common in fee, all the mines under the said lands, and all her real estates (except the said mines) to J. S., W. W. and W. D., their heirs and assigns, upon trust to sell the said real estates (except as before excepted). On the 26th December, 1812, S. D. demised to J. S. and W. W. two seams of the coal under the said lands for a term of fifty years at a rent of 105*l.* S. D. died in 1814, and the rent was paid to her seven children. T. T., the mortgagee, by his will, dated the 17th October, 1810, devised all freehold estates held by him in mortgage to J. H. and J. J., their heirs and assigns, and soon after died. By indentures of lease and release, the latter dated 10th June, 1815, between J. S., W. W. and W. D., devisees and trustees named in the will of S. D., of the first part, J. H. and J. J., trustees and executors named in the will of T. T., of the second part, J. T. (a mortgagee of other premises) of the third part, and B. K. of the fourth part: after reciting (inter alia) the mortgage by S. D. to T. T., and that J. S., W. W. and W. D., in execution of the trusts of the will of S. D., had put up for sale by auction the lands comprised in the said mortgage, at which sale B. K. was declared the purchaser of the said lands (except the mines and beds of coal under the same) for the price of 1,149*l.* 15*s.*; it was witnessed that J. H. and J. J. (at the request and by the direction and appointment of J. S., W. W. and W. D.) did bargain, sell, release, &c., unto B. K. the said closes of land, "together with all and singular the out-houses, buildings, gardens, &c., waters, water courses, &c., *quarries*" (omitting the word "mines"), except and always reserved, unto the said J. S. and W. W. during the term of thirty years, all the mines and beds of coal under the said closes of land with liberty to dig and sink pits, &c., for working the coal: to hold the said closes of land (except as before excepted) unto the said B. K., his heirs and assigns for ever:—*Held*, by the Court of Exchequer Chamber, affirming the judgment of the Court of Exchequer, that the mines and seams of coal did not pass under the conveyance to B. K.

(a) Before *Wightman, J., Erle, J., Williams, J., Crompton J., and Willes, J.*

*Hayes*, Serjt. (with whom was *Kerr*), for the plaintiff  
(the respondent). *Cur. adv. vult.*

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The judgment of the Court was now delivered by

WIGHTMAN, J.—This is an ejectment to recover possession by Joshua Denison (plaintiff in the action) of the mines and seams of coal under four closes of land, in Drighlington in Yorkshire, called the Upper Royd, the Middle Royd, the Low Royd and the Long Royd.

Joshua Denison is the heir at law of Sarah Denison, who, being seised in fee of those closes and of other lands in the immediate neighbourhood, mortgaged the four closes, in 1793, to one N. Nicholls for 550*l.*, and by lease and release of the 7th and 8th June, 1805, to which Nicholls and Sarah Denison were both parties, the four closes were granted and assigned, by Sarah Denison and Nicholls respectively, to Timothy Topham in fee, discharged of the proviso for redemption in the mortgage to Nicholls, but subject to a similar proviso on payment to Topham of 550*l.* and interest at a day named. In effect, Topham was put in the place of Nicholls with respect to the mortgage of the four closes, and the mortgage money (550*l.* and interest) not having been paid at the day named, the estate of Topham in those closes became absolute at law.

Sarah Denison (the mortgagor), by her will, dated 15th September, 1809, devised “all the mines, veins, beds and seams of coal, lying within and under divers lands and grounds of and belonging to her in Drighlington, which she had demised to William Woodhead for a long term of years, subject to the payment to her, her heirs and assigns, of the yearly rent of 105*l.*, unto and equally amongst her seven children (naming them), absolutely and for ever, as tenants in common; and she gave and devised all her mes-



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suages, cottages, lands, tenements and hereditaments in Drighlington aforesaid (save and except the said mines, veins and beds of coal thereinbefore specifically devised and disposed of) unto and to the use of John Scholefield, William Woodhead and William Denison, their heirs and assigns, upon trust to sell and dispose of the same (except as aforesaid)."

In 1812 Sarah Denison granted and demised to John Scholefield and William Woodhead all those two seams of coal, called the Stone Coal and the First Black Coal, lying and being under the before mentioned four closes, and under other closes, with liberty of raising and landing the coal &c. : to hold, from the 1st of January, 1813, for fifty years, at the yearly rent of 105*l.* for the first twenty-one years of the term, to be increased upon more than an acre being worked.

The lessees wrought the two seams of coal under the lease, but part of those two seams is still unwrought ; and the lessees, after the death of Sarah Denison, who died in 1814, paid the rent to the seven devisees in her will.

On 10th June, 1815, the devisees and trustees under Sarah Denison's will, and the trustees and executors of Timothy Topham (the mortgagee), by indenture of that date, reciting that the trustees under the will had put up the real estates of Sarah Denison, including those mortgaged to Topham to sale by auction, and that Benjamin King was the highest bidder for certain lots, which comprised the four before mentioned closes (which had been mortgaged to Topham), save and except the mines and beds of coal lying and being within and under the said closes, for the sum of 1149*l.* 15*s.*, and reciting that 550*l.* was due to the trustees of Topham, the mortgagee, did grant, bargain and sell to the said Benjamin King, all the four closes of land before mentioned, with all houses, edifices, buildings, gardens, yards, paths, watercourses, ditches, quarries, woods,

&c., other than and save and except and reserved to Scholefield and Woodhead, during the term of thirty years, to be computed from the 1st of January then last, all the mines and beds of coal lying, and being within and under those four closes thereinbefore described, and thereby intended to be granted and conveyed, with powers to be exercised by Scholefield and Woodhead over those closes for the purpose of their getting the coal: to have and to hold the said closes, and all other the tenements thereby intended to be released, with their appurtenances (except as before excepted), and subject as aforesaid to Benjamin King, his heirs and assigns for ever: and Scholefield and Woodhead covenanted with Benjamin King, to pay him at the rate of 4*l.* an acre for so much of the four closes as they might occupy with their coal works and ways, and make compensation for surface damage.

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The defendants in this action claim the seams of coal under the four closes, other than the two seams demised to Scholefield and Woodhead, and contend that they are entitled to them under the conveyance to King—and the question is, whether they are so entitled; for if they are not, it is not disputed that the plaintiff in the action is.

The Court of Exchequer decided that Joshua Denison, the plaintiff in the action, is entitled to succeed, and that no part of the mines and veins of coal under the four closes passed to King by the indenture of the 10th June, 1815; and we are of opinion that the judgment of the Court of Exchequer is right.

The indenture of the 10th June, 1815, recites that King had become the purchaser of the four closes, save and except the mines and beds of coal lying within and under them,—King therefore was not the purchaser of the mines of coal, though he was of all the other parts of the closes.—In the granting part of the deed, the closes with all build-

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ings, quarries, &c. (omitting mines),—with an exception and reservation to Scholefield and Woodhead, during the term of thirty years, of all the mines and beds of coal lying under the four closes thereby intended to be granted, with various powers to Scholefield and Woodhead,—are granted and released to King; and the habendum is to hold the four closes and all the tenements intended to be thereby released, except as aforesaid, to King.

It is clear to us that the parties to the deed did not intend to convey by it the coal to King; and the only ground which can give a colour to the argument that such was the intention, arises from the exceptions—but such an intention is so clearly inconsistent with the recital in the deed of what King purchased, that it would require very clear and unambiguous terms of conveyance to pass the mines of coal to King under that deed, more especially as the trustees of the will of Sarah Denison had no title to the mines, and the devisees of Topham, the mortgagee, only joined to give the legal title to that in which the trustees of Sarah Denison had only the equitable title, and had no real interest beyond the 550*l.* mortgage money. If, as was observed by the Court of Exchequer, King had been entitled to the mines of coal, he would have been entitled to the 105*l.* rent, which however was always paid to the devisees of Sarah Denison. The real reason for the introduction of the special exception was, most probably, that given by the Court of Exchequer; and agreeing as we do in opinion with that Court, the judgment will be affirmed.

Judgment affirmed.

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## IN THE EXCHEQUER CHAMBER.

*(Error from the Court of Exchequer.)*

LAING v. WHALEY and Another.

June 19.

THIS was a proceeding in error on the judgment of the Court of Exchequer in the case of *Whaley v. Laing*. The pleadings and special case are fully stated in the report of the case in the Court below (2 H. & N. 476.)

A declaration alleged that the plaintiff was possessed of steam-engines and boilers, and used, had, and enjoyed the benefit and advantage of the waters of a certain branch canal to supply the same, and which waters ought to have flowed and been without the fouling or pollution

*Atherton* argued (a) for the plaintiff in error (the defendant below) in last Michaelmas Term (November 26). —The declaration does not state that the plaintiffs were possessed of the water of the canal; but that they were possessed of steam engines, boilers, and used the waters of the canal for supplying the same with water. Then, in

thereafter mentioned: yet the defendant wrongfully discharged into the water of the canal foul materials and thereby rendered the waters foul, whereby the plaintiff's engines and boilers were injured. The defendant pleaded: first, not guilty: secondly, that the waters of the canal ought to have flowed and been without the fouling mentioned. An arbitrator, to whom the cause was referred, found that the plaintiff, by permission of a canal company, made a cut from the canal to his own premises, by which water got to those premises and with which water he fed the boilers of his engines. The defendant, without any right or permission from the Company, fouled the water in the canal, whereby the water as it came into the plaintiff's premises was fouled, and by the use of it the plaintiff's boilers were injured. Judgment having been given for the plaintiff:

*Held*, in the Exchequer Chamber, by *Williams, J., Crowder, J., and Willes, J.*, that the verdict upon the issue joined on the second plea ought to be found for the plaintiff: by *Wightman, J., Erle, J., and Crompton, J.*, that the verdict on that issue ought to be found for the defendant.

*Held* also, by *Wightman, J., and Williams, J.*, that the declaration was bad and the judgment ought to be arrested: by *Crowder, J., and Willes, J.*, that the declaration was good.

(a) Before *Wightman, J., Erle, J., Williams, J., Crompton, J., Crowder, J., and Willes, J.*

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order to connect themselves with a right to the water, they alleged that it ought to have run and flowed without the pollution complained of. No doubt the defendant has polluted the water; but the question is whether the plaintiffs are in a position to complain of it. That depends on whether any right exists, of which they have been deprived. The right claimed is to have a continuous flow of unpolluted water to supply their engines and boilers—not of water belonging to the plaintiffs or in their possession, but water of the defendant. The plaintiffs have no such right either under the indenture of the 1st January, 1823, or the indenture of the 1st January, 1847. By the former, the lessee was empowered to make a sluice or cut of certain dimensions from the Leeds and Liverpool Canal into the close called the Bowry pasture. That power was exhausted when the lessee made that cut; and there is nothing in the indenture to authorize the cut made by the plaintiffs from their engine pit into the Ince Hall Canal. The indenture of the 1st January, 1847, empowers the lessees to make dams and reservoirs, and collect water therein to work their engines, and assuming that they were entitled under that deed to make the canal they had no right to grant to the plaintiffs the use of its water. The judgment in the Court below rests on the assumption that the plaintiffs had acquired from the Canal Company a right to the possession of the water, and that it should flow to his premises in an unpolluted state. The judgment proceeds on the doctrine laid down in *Wood v. Ward* (a), but there the plaintiffs had a right to insist on the continuance of the flow of water in its natural state, and consequently the pollution of it by a riparian proprietor higher up the stream was an injury to that right. Here the arbitrator

(a) 3 Exch. 748.

finds that the cut made by the plaintiffs from their engine pit, into the Ince Hall Canal, was made by permission of one of the leasees named in the deed of the 1st January, 1847, and the facts stated do not necessarily import any permission as between the plaintiffs and the Company. Assuming that every member of the Company was cognizant of the plaintiffs' use of the water, their non-interference does not amount to a consent. The declaration shews no title whatever to the water, and the second plea traverses the allegation that it ought to flow without pollution. [*Williams, J.* The pleader has avoided the usual form of declaration. The usual form would be that the plaintiffs were possessed of a coal mine and by reason thereof were entitled to the flow of water. *Crowder, J.* The plaintiffs say that they have used the water and that it ought to flow without pollution: if the defendant did wrong it was at the moment of pollution.] The declaration alleges a right in the plaintiffs that water, not in their possession, should continue to flow in a certain state. [*Erle, J.* You say that the water must be lifted into the boiler, and the case is the same as if the plaintiffs had fetched the foul water and poured it into the boiler.] It is conceded that where a person has acquired a right to the possession of water, he is entitled to have it flow without pollution; but here the claim is with reference to water, not in the plaintiffs' possession and which they may never appropriate. Even if the defendant has committed a wrongful act, that does not render him liable to an action at the suit of *any* person; for instance, where a trespass is committed under a claim of a right of way, it is only the owner of the land who can sue in respect of it. *Hilton v. Whitehead* (a) is an authority that the declaration is bad in arrest of judgment. [*Willes, J.* That case is at variance with *Jeffries v. Williams* (b).]

(a) 12 Q. B. 734.

(b) 5 Exch. 792.

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*Milboord*, for the defendants in error (the plaintiffs below).—The plaintiffs acquired a right to the use of the water under the indenture of the 1st January, 1823: the subsequent grants were subject to the right conferred by that deed. This is surface water, and flows to the plaintiffs' premises as such. The Ince Hall Company were justified in making the canal, under the indenture of the 1st January, 1847; and it is immaterial whether the possession of the water is in them or Anderton, because the plaintiffs' title is derived from both. The parol permission to the plaintiffs to make the cut from their engine pit into the canal was equally valid as if it had been by deed: *Liggins v. Ince (a)*. The Company were cognizant of the plaintiffs' use of the water, and acquiesced in it. But assuming that the plaintiffs had no right under the indenture of 1823 and 1847, they were in the enjoyment of the water in point of fact to the year 1850, when the chemical works were erected. Having first used the water, they were entitled, as against the defendant, who was a wrong doer, to have it flow without pollution. [*Erle, J.* An action for a wrong involves a correlative right.] The law of watercourses is the same, whether natural or artificial, as regards all persons but the grantor of an artificial stream: *Magor v. Chadwick (b)*. In *Arkwright v. Gell (c)*, the action was against persons identified in interest with those who had made the artificial watercourse: it was made for a particular and temporary purpose, and the water had been originally taken by the plaintiffs with notice that it might be discontinued. It may be that the plaintiffs would have no right of action against the Ince Hall Company, because they are in the situation of grantors of an artificial stream, but the plaintiffs have a right of action against the defendants, who

(a) 7 Bing. 682.

(b) 11 A. & E. 571.

(c) 5 M. & W. 203.

are wrong doers. Suppose the plaintiffs had the mere usufruct of the water, and the defendants coming subsequently in point of time had abstracted it, they would have been liable to an action at the suit of the plaintiffs. In the same way, the fouling is an injury to the plaintiffs who first used the water. *Hilton v. Whitehead* (a) and *Jeffries v. Williams* (b) shew the distinction in this respect between a wrong doer and a person having a right to do the act complained of. In *Hilton v. Whitehead*, the action was against the proprietor of a coal mine for working it so negligently as to remove the support of the plaintiff's house, and the declaration was held bad for not stating the grounds on which the plaintiff was entitled to have his house supported by the land above the mine. But in *Jeffries v. Williams*, where the defendant was a wrong doer, the declaration was held good, although it contained no averment that the plaintiff had a right to have his messuages supported by the soil under which the defendant got the mines. *Northam v. Bowden* (c) is also an authority that a parol licence gives a sufficient possessory title as against a wrong doer.

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*Atherton* replied.

*Cur. adv. vult.*

The learned Judges having differed in opinion, the following judgments were now delivered.

WILLES, J., said.—I am of opinion that the judgment of the Court below ought to be affirmed, on the ground that the plaintiffs were in possession of the water and the defendant was a wrong doer. I consider it unnecessary to

(a) 12 Q. B. 734.

(b) 5 Exch. 792.

(c) 11 Exch. 70.



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add anything to the judgment delivered by my brother *Bramwell* in the Court below, which I think is quite right.

CROWDER, J.—I think the facts found by the arbitrator shew that the plaintiffs below, by permission of those who had the right, were in the enjoyment of clean water coming from the canal for the purpose of their engine. The act done by the defendant below was an injury to that enjoyment by the substitution of foul for clean water. The injurious effect upon the water used by the plaintiffs resulted immediately from the act of the defendant. The plaintiffs' use of the water was rightful, viz. by permission of those who had the right, and might grant or withhold such permission at their pleasure so long as that permission continued. I think "the waters of the branch canal ought to have run and flowed without the fouling and pollution of the defendant," and that consequently the issue on the second plea ought to be found for the plaintiffs.

It is further contended that no right of action is shewn in the declaration, and that the judgment ought to be arrested. But I think it sufficiently appears that the plaintiffs were in the lawful enjoyment of a beneficial flow of clear water from the branch canal, and that the defendant wrongfully polluted the stream, and thereby damaged the plaintiffs, which appears to me a sufficient statement of a good cause of action. I think therefore the judgment ought to be affirmed.

CROMPTON, J.—I think that the declaration in this case can only be supported on the ground of its claiming a *right* to the water for the supply of, or by reason of the possession of, the works in question. It states the possession of the mines and works and the use of the water for the

supply of the works; and then avers that the water *ought* to flow unpolluted, and that the defendant polluted it near to the place from which the supply was drawn. The word *ought* seems to me to import an allegation of right; and I think that the allegation that the water ought to flow unpolluted, in order to support the declaration after verdict, must be taken as meaning that the water ought to flow to the place in question, and ought to flow there unpolluted. I think that if a judgment were to pass for the plaintiffs, founded on a declaration like the present, it would be evidence for them and their privies in estate, as against the defendant, of the existence of the right to the flow of the unpolluted water.

If this be so, the plea seems properly to negative the existence of any such right as that on which the plaintiffs' right of action is founded. I do not say that an action might not under some circumstances lie in such a case as that referred to by Baron *Martin* in the Court below. Where a man has the permission of the owner of a pond to get water from it for his cattle, and a defendant, knowing of such permission and knowing the probable and natural effect and consequence of his act, poisons the water of such pond so as that the cattle are injured, probably an action would lie. Such an action is founded, not on the title or right to the water, but on the injury to the property of the plaintiff.

I do not think however that the present declaration is pointed to any such case; but I think it an informal declaration of the usual kind of declarations for an injury to a right of water connected with a mill or other works. And in such case a right must, I think, be proved, according to the rule laid down in the note (c) to *Coryton v. Lithelye* (a), and the case of *Fentiman v. Smith* (b).

It is true that in this case it is not distinctly averred that

(a) 2 Saunders, 113 a.

(b) 4 East, 107.

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the party is entitled by reason of the possession of the mill or works; but I think that the effect of the allegations, supposing the declaration to be good, must be that the party has the right in connection with the mill for the supply of which the use is averred to exist.

Then the question arises whether the right or title to the water, alleged as I think in the declaration and disputed by the plea, is made out on the facts stated in the special case. The case was first put on the deeds of 1823 and 1847. In the first deed, I can find nothing authorizing the placing, in the land in question, the pipe through which the plaintiffs draw their water. The plaintiffs' predecessors were by the deed to have the existing water courses, and were to have certain defined rights in the event of the Ince Hall Canal Company consenting, and they were enabled to make drains and reservoirs on the ground; but I find nothing to authorize them to put the pipe in question through the canal banks into the canal.

Still less could they have or derive any rights from the deed of 1847, which, in addition to the other objections, could only confer rights with reference to the mines mentioned in that deed, which are entirely different from the mines of the plaintiffs. It was said that they had rights as riparian proprietors on an artificial watercourse; but they were not the owners or occupiers of the soil on the banks, nor was the canal from its nature a watercourse in which persons having adjoining land would generally have riparian rights; and there was nothing to shew the existence of such rights in this particular case.

I think that the doubt expressed by the Court below, as to the plaintiffs having any title or right to the water, was well founded. And, as I do not think that I ought to construe this declaration as one complaining of foul water being improperly thrown upon plaintiffs' premises; but as an informal declaration founded on a right to the water; I

think that the facts do not make out the issue which the plaintiffs were bound to support ; and, therefore, I think that the judgment ought to be reversed, and that the verdict and judgment on the second issue should be entered for the defendant.

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ERLE, J.—I agree with the judgment of my brother *Crompton*.

WILLIAMS, J.—I am of opinion that in this case the verdict upon the issue joined on the second plea ought to be found for the plaintiffs, but that the judgment ought to be arrested, on the ground that the declaration is bad in substance.

I think it shews no cause of action. It merely alleges that the plaintiffs had enjoyed the benefit of the waters of a canal near to their engines, which waters had been used, and ought to have been free from the pollution thereafter mentioned ; and it then avers that the defendants polluted them and thereby damaged the engines.

I agree with the Barons of the Exchequer as to the construction of the allegation that the waters ought to have been free from pollution, viz., that it means not an assertion of title in the plaintiffs, but that the defendants had no right to foul the waters. But if this be so, then the declaration contains no allegation whatever that the plaintiffs were rightfully in the enjoyment of the benefit of the waters, and there is nothing to shew that they were not themselves wrongdoers in using them for their engines ; in which case I think they would have no right of action.

This cannot, I apprehend, be regarded as a mere formal defect in the declaration. If the declaration had been properly framed, an issue might have been raised on the question whether, in fact, the plaintiffs were rightfully in

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the enjoyment of the use of the waters of the canal; as to which I think the evidence is by no means satisfactory.

WIGHTMAN, J.—The plaintiffs in the action alleged, in their declaration, that they were possessed of mines, and of engines and boilers for working the mines, and used, had, and enjoyed the benefit and advantage of the waters of a branch canal, near the engines and boilers, to supply them with water for watering them; and that the water used and ought to run and flow without being fouled or polluted, but that the defendant wrongfully fouled and polluted the water and thereby injured the plaintiffs' engines.

The defendant (Laing) pleaded, first, not guilty; and secondly, that the water of the canal ought not to have run and flowed without the fouling and pollution in the declaration mentioned.

The plaintiffs allege no right whatever to take the water of the canal; they merely say that they had used and enjoyed the benefit of the water. They do not state how long they have used it, nor how long they have had the coal mines, nor that they had or used the benefit of the water of the canal by reason of their possession of the coal mines; and though they say that the water used and ought to run and flow without being polluted, they do not allege any reason why it ought to run and flow without being polluted, or that the defendant as against them had not as much right to pollute it for his purposes, as they had to take it for theirs. The allegation traversed, that the water ought to flow without being fouled or polluted, does not amount, in my opinion, to any assertion of right in the plaintiffs; but if it did, I also think that upon the facts stated in the case, there was no proof of any right in the plaintiffs, and that the verdict on the traverse of that allegation should be entered for the defendant.

I can find nothing in the declaration to shew that the defendant, by fouling the water, injured any right of the plaintiffs, nor that, as against them, he can be considered a wrong doer; and the introduction to the word "wrongfully" will not make him *prima facie* a wrong doer, unless the circumstances stated in the declaration shew him to be one. I am therefore of opinion that the declaration does not shew any right of action against the defendant, and that the judgment should be arrested.

Upon the facts as stated, the plaintiffs took water from the Ince Hall canal, at first with the express parol consent of one of the then owners of the canal, and afterwards without any objection, though without any express consent of or on the part of them who claimed through them. On the other hand, in 1850, the occupiers of the defendant's premises, which were used as chemical works, drained the refuse water from their works into the canal, through a drain which they had made, without any objection or remonstrance on the part of the owners of the canal, and the defendants who succeeded them did the same, but to a greater extent, and so as to render the water which the plaintiffs took from the canal corrosive of their engines and boilers. Neither the plaintiffs nor the defendants were riparian proprietors, and each appears to have done that which they did without any right, and merely by the sufferance and permission of the owners of the canal. The question upon the facts appears to me to be in effect the same as that upon the pleadings; and I am of opinion that the defendant in the action is entitled to our judgment whether the case is considered with reference to the pleadings or with reference to the facts, and the judgment of the Court of Exchequer should be reversed.

Judgment affirmed.

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## IN THE EXCHEQUER CHAMBER.

*(Appeal from the Court of Exchequer.)*

NIXON v. BROWNLOW.

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NIXON v. GREEN.

The subscribers' agreement of a proposed Company stated that it was formed for making a railway to be called "The Galway and Kilkenny Railway," and to commence at Kilkenny and terminate in the town of Galway, the capital to be one million in shares of

THE first of the above cases was an appeal against the decision of the Court of Exchequer in discharging a rule to set aside the verdict found for the plaintiff and enter it for the defendant, pursuant to leave reserved at the trial (reported 2 H. & N. 455).

The declaration, which was in scire facias, set out the writ, which stated that the plaintiff, on the 26th April, 1855, recovered against "The Kilkenny and Great Southern and Western Railway Company" a judgment for 508*l.* 8*s.*, whereof 197*l.* 14*s.* 6*d.* remained unpaid: that a *fi. fa.* directed to the sheriffs of London was issued upon the

25*l.* each. The deed empowered the directors to abandon the undertaking, or any part thereof and also to make application to parliament for an Act for any of the purposes aforesaid: also to fix upon, and from time to time to alter or vary the termini, route, course, or line of the railway; and to determine whether and how far, and to what extent the undertaking should be carried into effect and deferred or abandoned: and in case any Act should authorize the construction of a part thereof, to make in any subsequent session application for the construction of the remainder. The defendant executed the deed as a subscriber for 150 shares, and paid the deposit of 1*l.* 10*s.* per share. The directors applied to parliament and an Act passed (9 & 10 Vict. c. cccx.) which incorporated the Company by the name of "The Kilkenny and Great Southern and Western Railway Company," for making a railway from Kilkenny to Cuddagh, the capital of the Company to be 225,000*l.* in 11,250 shares of 20*l.* each. After the Act passed the defendant was placed on the register of shareholders as a subscriber for fifty shares of 20*l.* each:—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the defendant was a shareholder in the incorporated Company, and liable as such to execution on a judgment recovered by a creditor against the Company.

The 36th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, which enables execution to issue "*against any of the shareholders*," if the execution against the property or effects of the Company proves ineffectual, means shareholders at the time of the sheriff's return of *nulla bona*:—*So Held*, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer.

judgment against the effects of the Company, and that the sheriffs returned nulla bona. The writ then proceeded thus:—"And whereas you the said J. Brownlow, at the time of the said judgment and of the issuing of the said execution, and thence until and at the time of the notice herein-after mentioned, and thence until and at the time of the motion in open Court hereinafter mentioned, and thence hitherto, were and are a shareholder of and in the said Company of divers, to wit, fifty shares of 20*l.* each, and a large amount of the said shares at the time of the said judgment and execution was, and thence hitherto has been and is not paid up, to wit, 925*l.*" The writ then recited, that upon motion in open Court, after sufficient notice in writing to the defendant, the Court ordered that the plaintiff might proceed against the defendant as a shareholder of the Company according to the "Companies Clauses Consolidation Act, 1854," and the writ commanded the defendant (in the usual form) to appear and shew cause why the plaintiff should not have execution against him.—The declaration then stated the appearance of the defendant, and concluded with the usual claim of execution.

Plea (inter alia).—That the defendant was not a shareholder as alleged. Issue thereon.

The facts stated in the case on appeal (so far as material) are as follows:—

In April, 1845, a railway was projected, to be called "The Galway and Kilkenny Railway," and a prospectus was issued by the promoters of that Company.—(The case then set out the prospectus, which was headed: Length, 100 miles: capital, 1,000,000*l.* in 40,000 shares of 25*l.* each: deposit, 1*l.* 10*s.* per share).

On the 26th April, 1845, the Company was provisionally registered. There was no evidence that either the plaintiff or defendant ever saw or knew of the prospectus. Two deeds

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were executed by the defendant and other persons, being allottees of shares in the Company, viz. the parliamentary contract and subscribers' agreement.—The case then set out these deeds in an appendix. By the subscribers' agreement the defendant and the several parties thereto of the first part, each for himself, covenanted with the trustees therein named that he had subscribed the sum set opposite to his name in the schedule for the purpose of making a railway, to be called "The Galway and Kilkenny Railway Company," or by such other name as should be adopted by the directors, and that the railway should commence in the parish of St. John's, in Kilkenny, and terminate in or near the town of Galway, with a branch from the main line at or near Maryborough: that a capital not exceeding a million should be raised in shares of 25*l.* each, with power to the directors to increase such capital, or alter the capital for the time being, provided the assent to such increase should be obtained from a majority of the subscribers. The subscribers' agreement also contained the following provisions:—

That the committee or directors should have full power "to abandon the said undertaking or any part thereof, and also to make application to parliament in the ensuing session for an Act or Acts for all or any of the purposes aforesaid, and to renew, if necessary, such application in any subsequent session or sessions; and also to introduce, or to consent to the introduction in any act or acts of parliament, for which application may be made as aforesaid, of any such special or other clauses and provisions as to the said committee or directors may seem proper or desirable: and also to fix upon, and from time to time to alter or vary, the termini, route, course, or line of the said railway and the sites or spots of the stations, depôts and works connected therewith: and to determine whether and how far and to what extent the said undertaking should be

carried into effect and deferred or abandoned; and in like manner what branches, if any, from the main railway shall form a part of the said undertaking: and in case any Act shall be obtained in relation to the said undertaking which shall authorize the construction of a part or parts thereof, the committee or directors shall have power to make or support, in any subsequent session or sessions, such applications to parliament as they may deem advisable for the construction of the remainder of the undertaking or any part or parts thereof."

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In April 1845, the defendant applied for shares in the Company mentioned in the prospectus, and 150 shares of 25*l.* each were allotted to him in that Company. The defendant paid a deposit of 1*l.* 10*s.* upon each of such shares amounting to 225*l.* On the 13th June, 1845, the defendant executed the parliamentary contract and subscribers' agreement, and received scrip certificates for 150 shares. On the 8th May, 1845, the defendant sold the whole of his shares. No evidence was given of any notice to the Company of such sale; nor was there any evidence that the vendee was applied to, to be registered in respect of such shares.

In the session of parliament of the 9 & 10 Vict. an Act was passed, intituled "An Act for making a railway from Kilkenny to join the Great Southern and Western Railway at or near Cuddagh, to be called "The Kilkenny and Great Southern and Western Railway."—(The case then set out the 2nd, 3rd, 4th, 5th, 19th, 25th, 26th and 42nd sections of the 9 & 10 Vict. c. cccix.)

The periods of three and seven years mentioned in the 25th and 26th sections of the Act were afterwards duly extended to five and nine years.

The secretary of the Company proved that the defendant's name was on the first register, dated the 4th

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February, 1848. That register was sealed: the last register, which was in 1855, was not sealed. The defendant's name was there and in all the intermediate ones. The last sealed register was dated the 21st February, 1849.

*Ogle* argued for the defendant in last Easter Vacation (*a*) (May 13).—The first question is, whether, upon the facts stated, the defendant can be considered as a person who “has already subscribed to the undertaking” within the meaning of the 3rd section of the 9 & 10 Vict. c. cccix. The “undertaking” authorized by the Act was to make a railway from Kilkenny to Cuddagh; the undertaking to which the defendant subscribed was to make a railway from Kilkenny to Galway. The second question is, whether, at the times specified in the declaration, viz. at the time of the judgment, of the issuing of the execution, and thence until and at the time of notice, the defendant was a shareholder in the Company within the meaning of the 36th section of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16). *Nixon v. Green* (*b*) decided that the word “shareholders,” in the 36th section of that Act, means shareholders at the time of the sheriff’s return of nulla bona. In this declaration the date of the sheriff’s return does not appear; therefore the question is, whether the defendant was a shareholder at the time of the judgment, or of the issuing of execution, or at the time of the notice. That depends on two points: first, whether the defendant’s name was properly entered on the registers of the 4th February, 1848, and 21st February, 1849; secondly, whether the registers, if accurately made up, are evidence in any other actions except those upon the subscription contract or for calls; and, if so, whether a register of 1848 is evidence that a

(*a*) Before *Wightman, J., Erle,* and *Willes, J.*  
*J., Williams, J., Crompton, J.,* (*b*) 11 Exch. 550.

person was a shareholder in 1856, or at any length of time. The register must be sealed, in which case only is it evidence; and the 9th section of the Companies' Clauses Consolidation Act requires "that such authentication by the seal of the Company shall take place at the first ordinary meeting of the Company," and so from time to time at each ordinary meeting. By section 66, two of such meetings must take place in each year. Therefore at each meeting there must be a new register, and that register will be evidence, for the next six months, of the persons who are shareholders—but only as between the Company and the shareholders, not as between the Company and strangers. [*Williams, J.*—If a person has taken shares, must it not be presumed that he is a shareholder until the contrary is proved?] The defendant has never taken shares in the Company incorporated by the 9 & 10 Vict. c. ccclx.: he took shares in "The Galway and Kilkenny Railway" upon the terms mentioned in the subscribers' agreement of that Company; but the plaintiff seeks to render him liable as a shareholder in a totally different undertaking. The amount of capital and number of shares is altered, and part of the intended line is abandoned. The defendant joined one undertaking, and, without his consent, he is made a party to another. The consequence is that he is subject to a responsibility that he never undertook. Suppose that, before the defendant executed the parliamentary contract and subscribers' agreement, the promoters of the Company had told him that they were unable to raise an amount of the proposed capital sufficient to carry into effect the original project, might he not have recovered back his subscription as upon a failure of consideration? Then the circumstance of his having executed those deeds does not prevent him, for he did not execute them until more than a month after he had sold his shares. At that time he

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ceased to have any connection with the Company. He was obliged to sign the deeds, or he could not have transferred the scrip to the purchaser. If the defendant had not received his scrip he might have recovered back his deposit, as, upon an abandonment of the undertaking: *Walstab v. Spottiswoode* (a). *Pückford v. Davis* (b) is an express authority that a subscriber to a projected Company, who has taken shares and paid a deposit on the faith of a prospectus stating a certain amount of capital and number of shares, is not liable on contracts made by the directors if they begin their works with less capital and a smaller number of shares, unless he has assented to their proceeding. In *Tredwen v. Bourne* (c) there was evidence of such assent: here there is none. *The Galvanized Iron Company v. Westoby* (d) shews that a contract of this kind is conditional on the full amount of capital being subscribed. The amount of capital and value of shares are part of the constitution of the Company: *Smith v. Goldswoorthy* (e). It is said that by the terms of the subscribers' agreement the defendant has authorized the directors to reduce the capital; but there is nothing in that deed which warrants such a construction. The deed only empowers the directors "to abandon the said undertaking, or any part thereof, and also to make application to parliament in the ensuing session for an Act or Acts for all or any of the purposes aforesaid," &c., "and also to fix upon, and from time to time to alter or vary, the termini, route, course or line of the said railway," &c., "and to determine whether, and how far, and to what extent, the said undertaking should be carried into effect, and deferred or abandoned," &c. The deed contains no authority to the directors to reduce the pro-

(a) 15 M. &amp; W. 501.

(d) 8 Exch. 17.

(b) 5 M. &amp; W. 2.

(e) 4 Q. B. 430.

(c) 6 M. &amp; W. 461.

posed capital. When the defendant consented to take 160 shares in an undertaking with a capital of 1,000,000*l.*, in shares of 25*l.* each, he no doubt considered it safe to join the concern, because, if called upon to pay any debts, he might recoup himself from the other subscribers. But when the capital was reduced, his responsibility was increased and his chance of recovering from the other subscribers diminished. Suppose the defendant, when he sold his shares, had taken from the purchaser a bond for payment of the purchase money: how could he recover on the bond after the Company was altered, for the purchaser would not obtain what he had bargained for. Thus the defendant would lose the whole purchase money in consequence of the acts of the directors. Again, not only is the amount of capital altered, but also the number of shares. [*Crompton, J.*—The subscribers' agreement only says that a capital shall be raised not exceeding a million: there is no stipulation that it shall amount to a million. If the deed referred to the prospectus, so as to be read with it, the case might be different. *Erle, J.*—If the directors have authority to construct any part of the proposed line, why may they not reduce the capital in proportion to the reduced expenditure? *Wightman, J.*—The directors clearly had the power of making a portion of the line. Then, if they did not require the whole of the capital originally proposed, there seems no reason why they should raise it: if the amount of capital had remained, the number of shares might have remained; the capital being reduced, fewer shares were required.] In *The Cork and Youghal Railway v. Paterson* (a) the Court did not attribute any weight to the argument that, as the directors had power to make a part of the line only, they were justified in proceeding with a reduced capital. In *The Midland Great Western Railway Company v.*

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*Gordon* (a) the undertaking sanctioned by the Act was substantially the same as the one projected, and moreover the powers given to the directors by the subscribers' agreement were larger than those in the present case. The expressions of *Parke, B.*, in that case were not approved of in *The Great Western Railway of Ireland v. Leech* (b). Here the powers contained in the subscribers' agreement merged in the incorporated Company. Directors have no power of their own accord to alter the name of a Company: *Regina v. The Registrar of Joint Stock Companies* (c). There is not the slightest identity between the undertaking to which the defendant subscribed and that to which it is sought to make him a party. Even the subscribers are different, for there are some members of the present Company who never subscribed to the original undertaking. Nevertheless it is said that the production of the register with the defendant's name upon it is evidence that he is a shareholder. It is true the register is made *prima facie* evidence by the 8 & 9 Vict. c. 16, s. 9, but that is only when it has been authenticated as required by that and the 66th section. If the directors neglect its authentication at the proper period its validity as evidence is gone for ever. The 14th section of the 9 & 10 Vict. c. cclx. requires the first ordinary meeting of the Company to be held within six months after the passing of the Act, at which meeting the register ought to have been produced and sealed: (8 & 9 Vict. c. 16, s. 9); but that was not done until eighteen months after the passing of the Act. In *Bain v. The Whitehaven and Furness Junction Railway Company* (d), Lord Brougham said that he was disposed to look at the strict execution of the direction contained in the 9th section of the Companies Clauses Consolidation Act as a condition precedent to the enjoy-

(a) 16 M. &amp; W. 804.

(b) 3 H. L. Cas. 872.

(c) 10 Q. B. 839.

(d) 3 H. L. Cas. 1, 23.

ment of the extraordinary privilege conferred by the 29th section of making a man's own writing evidence for himself and against another party. *The Galvanized Iron Company v. Westoby* (a) shews that the *prima facie* case arising from the fact of the defendant's name being on the register may be rebutted by the facts. There is no evidence that the defendant subscribed to the undertaking authorized by the special Act; and assuming that he was originally liable, there is no evidence that he is a "shareholder" within the meaning of the 36th section of the Companies Clauses Consolidation Act.

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*Unthank*, who appeared for the plaintiff was not called upon to argue.

*Cur. adv. vult.*

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NIXON v. GREEN.

THIS was a proceeding in error on the judgment of the Court of Exchequer for the plaintiff on the demurrers in this case (reported 11 Exch. 550), and also on a bill of exceptions which raised the same question as in *Nixon v. Brownlow*.

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*Slade* argued for the defendant in last Trinity Vacation (June 19.)—The demurrers raise two questions: first, when may execution be said to have issued against the person sought to be charged? Secondly, at what time must it be shewn that he was a shareholder? Those questions depend on the construction of the 36th section of the 8 & 9 Vict. c. 16. Under that enactment no execution can issue

(a) 8 Exch. 17.



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against a shareholder without the leave of the Court; therefore the earliest date at which it can be said to have taken place is the day of granting the rule authorising the issuing of the scire facias. The language of the 36th section is: "such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the Company *not then paid up*." The word "then" has reference to the application for leave to issue the scire facias, and consequently the section means that execution may issue against a person holding shares at that time. The decision of the Court of Exchequer proceeds on the ground that a judgment against the Company is a judgment against all the shareholders. [*Wightman, J.*—The words "not then paid up" mean at the time of the execution against the Company.] By the 36th section execution can only issue against a shareholder to the extent of his shares; therefore if at the time of execution against the Company he has paid the full amount of his shares his liability ceases. That shews that the words "not then paid up" must mean at the time of execution against the Company. [*Wightman, J.*—The defendant has not pleaded that he has paid up to the extent of his shares; therefore it must be taken that he has not.] The time of liability and extent of liability must be fixed by the same period. Suppose no proceeding was taken for a long time after the return of nulla bona; if in the interval a shareholder, who had paid up his calls, sold his shares, he would not be liable, and according to the judgment of the Court of Exchequer the purchaser of the shares would not be liable. It is no hardship on a creditor that a shareholder has parted with his shares; if there is any fraud, that might be replied. In *Dodgson v. Scott(a)*, where a similar question arose on the Banking Copartnership Act, 7 Geo. 4, c. 46. s. 13, which

(a) 2 Exch. 457.

enables execution to issue against any member *for the time being* of such copartnership, it was held that the words "for the time being" meant "at the time the execution issued." —He also referred to an unreported case of *Devereux v. Emery (a)*.

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*Unthank*, for the plaintiff.—The pleas are bad and the replication good. By the latter part of the 36th section, the register of shareholders is made accessible to creditors, in order that they may ascertain the persons against whom they are to pursue their remedy. That shews that the word "shareholders," in that section, means the persons whose names are on the register of shareholders at the time the execution against the property and effects of the Company proves ineffectual; that is, at the time of the return of nulla bona. The language of the 13th section of the Banking Copartnership Act is materially different from that of the 36th section of the Act in question. Under those Acts a scire facias is necessary: *Hitchins v. The Kilkenny and Great South Western, &c. Railway Company (b)*; but under the 7 & 8 Vict. c. 110, s. 68, execution may issue by leave of the Court without any suggestion or scire facias. This is not the ordinary proceeding by scire facias, but a writ of scire facias quare executionem non, founded on the return of nulla bona, and preceded by notice and motion in Court. At common law the return of nulla bona was notice to all persons sought to be affected by it; and under this Act, after such return, a shareholder has no right to transfer his shares. The word "*then*," in the 36th section of the 8 & 9 Vict. c. 16, points to the time when persons are liable as shareholders, and no other time can be fixed than the return of nulla bona. A shareholder

(a) As to this case, see 2 H. & N. 553, note.

(b) 10 C. B. 160.

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cannot voluntarily pay up the amount of his shares after proceedings are taken against him any more than an executor can voluntarily pay debts of equal degree.

*Slade* replied on this point, and stated that the question raised by the bill of exceptions had been so fully argued in the case of *Nixon v. Brownlow* that he should offer no further argument on the subject.

*Cur. adv. vult.*

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The judgment of the Court in the above cases was now delivered by

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WIGHTMAN, J.—In the case of *Nixon v. Green* the first question is, whether the defendant was a shareholder in the Kilkenny and Great Southern and Western Railway Company at all; and, secondly, whether it is sufficient that the defendant, if a shareholder, was so at the time of the return of *nulla bona* to the writ against the company, or whether it must also appear that he was a shareholder at the time of the *scire facias*, or of the rule of court by which the *scire facias* is allowed.

With respect to the first question, it was contended for the defendant that he never proposed or subscribed for shares in the railway Company in question, though he did propose and subscribe for fifty shares in another proposed railway, to be called "The Galway and Kilkenny Railway Company." The shares in the last-mentioned proposed Company were to be 40,000 of 25*l.* each, and it was to begin at Kilkenny and terminate at Galway, with a branch to Maryborough.

The defendant paid 75*l.* on account of his shares, at

the rate of 1*l.* 10*s.* per share, as a deposit, and executed what is called "the parliamentary contract," and also an indenture called "the subscribers' agreement."

By that agreement it was provided that a capital, not exceeding 1,000,000*l.* should be raised, in shares of 25*l.* each, and that the committee or directors of the proposed company should have full power to abandon the whole or any part of the undertaking, and to apply to parliament for an Act for all or any of the purposes mentioned in the deed; and to introduce into the Act any clauses or provisions that the committee or directors might think proper; and to fix upon and alter, and vary the termini, course, or line of the railway; and to determine how far, and to what extent, the undertaking should be carried into effect, and deferred, or abandoned, and what branches, if any, should form part of the undertaking; and in case any Act, to be obtained in relation to the undertaking, should authorise the construction of a part, the committee or directors might make such application as they thought advisable for the construction of the remainder or any part thereof.

The directors of the proposed Company appear to have thought it in expedient to apply for an Act for the whole line from Kilkenny to Galway, and acting upon the authority given to them by the subscribers' agreement, to which the defendant Green was a party, obtained an Act, the 9 & 10 Vict. c. ccclx., for making a railway from Kilkenny to join the Great Southern and Western Railway at or near Cuddagh, which was, in effect, making a part of the proposed railway from Kilkenny to Galway. This appears from the 19th section of the Act, which refers to the plans deposited with the clerk of the peace of the county of Kilkenny. By the Act the capital of the Company was to be 225,000*l.*, divided into 11,250 shares, of 20*l.* each, and the defendant was placed by the directors on the register of

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the Company formed under the Act as a shareholder of fifty shares. The defendant contended, that though the directors might have had authority to place his name upon the register of shareholders in the railway Company originally contemplated by the subscribers' agreement, if an Act, in conformity with that agreement, had been obtained, they had no power or authority to put his name upon the register of shareholders in a Company for a different railway, with a different amount of capital, and with a different amount of shares.

We are, however, of opinion that the Company which has been established under the Act is, in effect, the same Company that is contemplated by the subscribers' agreement, and that the directors have not exceeded the authority given to them by the subscribers' agreement, and that they were fully warranted in placing the name of the defendant upon the register of shareholders of the Company formed under the Act. The undertaking sanctioned by the Act is one applied for by the directors, under the authority given to them by the subscribers' agreement; and, according to the cases of *The Midland Great Western Railway Company of Ireland v. Gordon (a)* and *The Cork and Youghal Railway Company v. Paterson (b)*, the directors are warranted in putting upon the register of the shareholders of the Company, constituted by the act of Parliament, the names of those who would have been upon the register if an Act had passed in accordance with the original project, for the construction of a railway from Kilkenny to Galway. We are, therefore, of opinion that upon the first point the judgment of the Court of Exchequer in the case of *Nixon v. Green* was correct, and our judgment is in favour of the plaintiff in the action.

(a) 16 M. & W. 804.

(b) 18 C. B. 414.

With respect to the second point, we are also of opinion that the plaintiff in the action is entitled to our judgment.

By the 8 & 9 Vict. c. 16, s. 36, "if any execution, either at law or in equity, shall have been issued against the property or effects of the Company, and if there cannot be found sufficient whereon to levy such execution, *then* such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the Company not *then* paid up."

It is quite consistent with the plea that the defendant may have been a shareholder at the time of the return of *nulla bona*, and of the granting of the rule nisi for a scire facias, and the service of such rule upon the defendant.

By the terms of the Act, "if there cannot be found sufficient effects of the Company whereon to levy, *then* execution may issue against any shareholders to the extent of their shares not *then* paid up." It appears to us that *then* refers to the time when sufficient effects of the Company cannot be found whereon to levy, which time is fixed by the sheriff's return of *nulla bona*; and we therefore are of opinion that the judgment of the Court of Exchequer is correct upon this point also; and the judgment therefore pronounced by that Court in the case of *Nixon v. Green* ought, we think, to be affirmed.

We are also of opinion that the judgment of the Court of Exchequer in the case of *Nixon v. Brownlow* should be affirmed for the reasons we have given in the case of *Nixon v. Green*.

Judgments affirmed.

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## IN THE EXCHEQUER CHAMBER.

*(Error from the Court of Exchequer.)*

June 19.

HILL v. LEVEY and Another.

Disputes  
having arisen  
between com-  
positors and  
master printers  
as to payment  
to the former  
for printing  
advertisements  
on wrappers,

THIS was a proceeding in error upon the judgment of the Court of Exchequer on a special case. The facts are set forth in the judgment of the Court, *antè*, p. 7.

*Joyce* argued for the appellant (*a*).—The first question

the following rules were made by a committee of each body:—"Wrappers. The compositor on a magazine or review to be entitled to the first or title page of the wrapper of the magazine or review, but not to the remaining pages of such wrapper or to the advertising sheets which may accompany the magazine or review. Standing advertisements or stereo-blocks forming a complete page, or when collected together making one or more complete pages in a wrapper or advertising sheet of a magazine or review, not to be charged. The compositor to charge only for his time in making them up. The remainder of the matter in such wrappers or advertising sheets, including standing advertisements or stereo-blocks not forming a complete page, to be charged by the compositor and cast up according to certain articles of the scale referred to, as they may respectively apply." In the November number of a Monthly Magazine there was composed and printed on one page two advertisements which occupied the entire page, and the type of which was left standing. In the December number, the same two advertisements were printed, but on different pages; and each occupied about half a page and the remainder of the page was filled up by other advertisements. The plaintiff, who was a compositor, insisted that, under the latter part of the rule, he was entitled to charge for the composing; the defendant, who was the master printer, contended that the case was within the first part of the rule, and that the plaintiff was only entitled to charge "for his time in making up." In the year 1856, a similar dispute arose between a compositor and a master printer, and the matter having been referred to arbitration in pursuance of certain rules which were still in force, three arbitrators awarded in favour of the master. The plaintiff entered the defendant's service with knowledge of that decision, and that the defendant had been one of the arbitrators; nothing, however, was said as to the terms of payment; but both parties understood that it was to be made according to the rules.

*Held*, by the Court of Exchequer Chamber, (affirming the judgment of the Court of Exchequer); first, that the decision of the arbitrators was not, at the time of the employment of the plaintiff, binding between the parties as an interpretation of the rule; and that notwithstanding their decision it was competent for the Court to entertain the question of its construction.

Secondly, that the plaintiff was entitled to recover for the composing; the true construction of the rule being: that the compositor may charge according to the scale when any advertisement not standing is inserted in the same page with a standing advertisement, but that when standing advertisements are printed in the same page so as completely to fill it, the compositor is only entitled to charge for his time in making up.

(*a*) Before *Wightman, J., Erle, J., Williams, J., Crompton, J., Willes, J., Crowder, J., and Byles, J.*

is, whether the decision of the arbitrator is binding upon the plaintiff. The case finds that the plaintiff went into the defendants' employ with knowledge of the construction which had been put by the arbitrator upon the rules, and both parties understood that payment was to be made according to the rules; he must therefore be taken to have entered into a contract subject to the rules as interpreted by the arbitrator. The case finds that for more than fifty years the business of printing in London as between the master printers and compositors has been regulated by committees of each body, who have from time to time agreed upon rules which, so long as they remain unaltered, are treated and acted upon as binding upon master and compositor, and are imported into every engagement to which they are applicable; therefore the plaintiff and defendants must be taken as bound by these rules. The two committees having met, and this question having been referred to them and the barrister, the decision in favour of the view taken by the masters became as much a rule of the trade from thenceforth as any of the other rules. [*Crompton, J.*—It appears, however, that, before proceeding on the arbitration, the secretary of the committee of the compositors stated that the decision was not to be a guide to the trade in future, but was to be confined to the particular case.]—He also contended that, upon the construction of the rules, the plaintiff was not entitled to be paid for standing advertisements if, when collected and measured together, they would make a page or pages.

*Malcolm Kerr*, for the plaintiff, the respondent, was not called upon to argue.

*WIGHTMAN, J.*—We are all of opinion that the Court of

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Exchequer have rightly decided both the points submitted to them by this special case. On the question whether the plaintiff is bound by the decision of the barrister, we think he is not. The parties to this action were not parties to the reference; nor by anything which has taken place has the decision on that reference been made binding on the plaintiff. The second question is as to the construction of the rule. We think the true meaning of the passage in dispute is that contended for by the compositors. It is provided first that "standing advertisements, or stereo blocks, forming a complete page, or, when collected together, making one or more complete pages in a wrapper or advertising sheet of a magazine or review, are not to be chargeable. The compositor to charge only for his time in making them up." That applies to a case when the standing matter consists of complete pages. Then comes this clause:—"The remainder of the matter in such wrappers or advertising sheets, including standing advertisements or stereo blocks, not forming a complete page, to be charged by the compositor, and cast up according to the 8th and 20th articles of the scale, as they may respectively apply." That provides for standing advertisements occupying less than an entire page. We think therefore that the judgment of the Court of Exchequer must be affirmed.

Judgment affirmed.

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# Exchequer Reports.

MICHAELMAS TERM, 22 VICT.

FOSTER, Public Officer, &c., v. COLBY.

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Nov. 15.

**T**ROVER by the plaintiff, as one of the registered public officers of the London Joint Stock Bank, for linseed.

Pleas: First, not guilty. Secondly, that the linseed was not the property of the bank.

At the trial a verdict was taken for the plaintiff, subject to a special case, in substance as follows:—

The action was brought to recover 1000*l.* part of the proceeds of 1652 bags of linseed, shipped at Calcutta in September, 1855, on board the "Atalanta," and landed at the docks in London in February 1856. The defendant in January 1855, and from thence until this action, was captain and part owner of the "Atalanta." The London Joint Stock Bank claimed the linseed as indorsees and holders of the bill of lading and shipping documents

S. & W. chartered a ship from Liverpool to Calcutta and home for the sum of 7000*l.* "The freight to be paid 1250*l.* on vessel clearing from Liverpool, and 1000*l.* on delivery of the outward cargo at Calcutta, the remainder in cash two months from the vessel's report inwards, and after right delivery of the cargo, or under discount at 5 per cent. per annum at

freighter's option. The master to sign bills of lading at any rate of freight required without prejudice to this charter-party. The owners of the ship to have an absolute lien on the cargo for all freight, dead freight and demurrage." There were provisions for payment of the freight in cash on delivery of the cargo, if the cargo was delivered abroad. S. & C., who were the charterer's agents at Calcutta, having made advances to disburse the vessel, shipped a quantity of linseed, for which the captain signed bills of lading deliverable to their order or assigns on payment of freight at 5*s.* per ton, the current rate being 5*l.* 10*s.* Against this shipment S. & C. drew a bill of exchange and indorsed and delivered it together with the bill of lading for value.

*Held*: First, that assuming the charter-party to have created a lien for the charter-party freight as against the charterer, a bonâ fide indorsee of the bill of lading, without notice of the charter-party, was entitled to the linseed on payment of the bill of lading freight.

Secondly, that the charter-party did not create any lien in respect of that part of the freight which was payable at two months after the vessel's report inwards.

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thereof, and they assert that they were entitled to the possession of it on the tender of the *bill of lading freight* and charges. The defendant asserts a lien on the linseed for the sum of 1000*l.* *freight payable by the charter-party* hereafter mentioned.

The defendant, on the 30th of January, 1855, chartered the "Atalanta" to Syers, Walker & Co., for a voyage from Liverpool to Calcutta and back, by a charter-party, the material parts of which were as follows:—

"London, 30/31 January, 1855.

"It is this day agreed between Captain E. G. Colby, master and part owner of the good ship "Atalanta," &c., now at Liverpool, and Messrs. Syers, Walker & Co., &c.: that the said ship being copper sheathed, &c., shall with all convenient speed after discharge of her inward cargo at Liverpool, load there from the agents of the freighters a full and complete cargo, &c., and so loaded, &c., shall proceed to Calcutta, and there having discharged her cargo and being copper sheathed, &c., load from the agents of the freighters a full and complete cargo, &c., which the freighters bind themselves to ship, &c., and being so loaded shall therewith proceed to London or Liverpool as ordered by freighters' agents at Calcutta, and deliver the same in any dock freighters may appoint, agreeably to bills of lading, on being paid freight in full of all port charges, pilotage and primage, after the rate of seven thousand pounds lump sum; the act of God, restraint of princes, &c., always excepted. The freight to be paid as follows: 800*l.* in cash on vessel's clearing from Liverpool; 700*l.* on right delivery of the cargo outward at Calcutta in rupees, &c., and the remainder in cash two months from the vessel's report inwards at London or Liverpool, and after right delivery of the cargo or under discount at 5 per cent. per annum at freighters' option. \* \* \* The master to sign the bills

of lading at any rate of freight required without prejudice to this charter-party. \* \* \* Freighters to have the power of underletting the whole or part of the vessel. The owners of the ship to have an absolute lien on the cargo for all freight, dead freight and demurrage. \* \* \* Freighters likewise to have the option, instead of loading the ship for London or Liverpool, to order her to proceed to Cork or Falmouth for orders, to be sent to the master within three posts, to discharge either at London or Liverpool, or at a good and safe port on the continent between Havre and Hamburg: the freight in such case to be 7100*l.*, if they be ordered to discharge at London or Liverpool; 7500*l.*, if they be ordered to discharge at a port on the continent; freight on the continent to be paid in cash on right delivery of the cargo at the exchange of the day, less two months discount at 5 per cent. per annum: all other terms and conditions to remain as before.

“Signed E. G. Colby,

“Syers, Walker & Co.”

By a memorandum afterwards added, it was agreed that the advances at Liverpool should be increased to 1250*l.*, and at Calcutta to 1000*l.* The sum of 1250*l.* was paid to the defendant at Liverpool by Syers, Walker & Co., and an outward cargo was provided for her, consisting partly of 1000 tons of salt consigned by them to Stewart & Calrow, merchants at Calcutta, the correspondents of Syers, Walker & Co. On the ship's arrival at Calcutta, Stewart & Calrow, to whom the charter-party had been sent, assumed the control of her as agents of the charterers and paid the 1000*l.* on account of the charter-party freight, the last payment being made on the 3rd of October, 1855. The homeward cargo was procured by Stewart & Calrow, and the goods mentioned in the freight list, at freights amounting to 3059*l.* 10*s.* 1*d.*, were shipped partly by Stewart

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& Calrow, and partly by other persons at Calcutta, on the procurement of brokers employed for that purpose by Stewart & Calrow. The linseed in question was shipped by Stewart & Calrow. It had been purchased on account of Syers, Walker & Co. by Stewart & Calrow out of their own monies, they not having in their hands applicable to such purchase any funds of Syers, Walker & Co., who then were and still are largely indebted to them. The linseed was put on board before any bill of lading was presented for signature.

The bill of lading was as follows:—

“Shipped in good order and condition, by Stewart and Calrow, in the good ship ‘Atalanta,’ whereof Colby is master, &c., 1652 bags of linseed, &c., to be delivered in the like good order and condition at the port of London (all and every the dangers and accidents of the seas and of navigation of whatsoever nature or kind excepted) unto order or to assigns; freight for the said goods being payable there at the rate of 5*s.* per ton net, with average accustomed. In witness, &c.

“Dated the 18th Sept. 1855. Signed E. G. Colby.

“Indorsed

“Stewart & Calrow.”

Mr. Stewart in his evidence stated that it was customary for merchants in the ordinary course of business to purchase bills of exchange drawn against shipments of goods, upon the security of the bill of lading of such goods at a nominal freight. That the bills were filled up at a low rate of freight, by reason of advances made by Stewart & Calrow, for which credit would have to be given by the owners, and that he told captain Colby that, having no funds of the charterers in hand, he would not load or disburse his ship unless captain Colby would sign such bills of lading as he might require at a nominal freight.

The current rate of freight for linseed from Calcutta to London at the time of the shipment was from 5*l.* to 5*l.* 10*s.* per ton.

Stewart & Calrow drew a bill of exchange dated the 29th of September, 1855, for 2300*l.*, at six months after date, on Syers, Walker & Co., against the shipment of the linseed, which they sold in the ordinary course of business, and indorsed to The Mercantile Bank of India London and China, receiving Company's rupees 21,028. 9. 3., being the full amount of the bill. They indorsed the bill of lading in blank, and delivered it and the shipping documents to the Mercantile Bank. They also delivered to them a letter of hypothecation of the linseed, dated the 8th of October, 1855. The Mercantile Bank did not know that the linseed was purchased for Syers, Walker & Co., or that the "Atalanta" was chartered by them. The bill of exchange, letter of hypothecation and bill of lading were forwarded by the Mercantile Bank to their manager in London. The bill of exchange was accepted by Syers, Walker & Co. on the 15th of November, 1855, and on the 17th the Mercantile Bank indorsed the bill of exchange and handed it with the bill of lading to the London Joint Stock Bank, for a balance due from them to the latter bank, with no further information than was contained in the documents handed over.

The ship arrived on the 10th of February, 1856. On the 18th, the defendant gave notice to the superintendent of the Victoria Docks to detain the linseed until payment of the freight as per bill of lading, and 1000*l.* balance of freight as per charter-party.

Syers, Walker & Co. suspended payment on the 4th of April, and afterwards became bankrupts. The bill of exchange became due on the 18th of May: on the 24th the attorney of the London Joint Stock Bank demanded the

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linseed of the manager of the Victoria Docks, and at the same time produced the bill of lading, and tendered the freight as per bill of lading with charges. The manager acknowledged the tender, but refused to deliver the linseed except on payment of 1000*l.* balance of freight as per charter-party. An interpleader order was subsequently obtained by the Victoria Dock Company, whereby it was ordered that an action should be commenced against the present defendant, and that the conversion by the Dock Company should be deemed the conversion by him.

The question for the opinion of the Court is, whether, on the 24th of May, 1856, the defendant was, as against the said London Joint Stock Bank, entitled to a lien upon the linseed for any amount of freight beyond that made payable by the bill of lading. If the Court should be of opinion in the negative, then the verdict for the plaintiff is to stand. If the Court should be of opinion in the affirmative, then the verdict is to be entered for the defendant.

*Bovill* (with whom was *Archibald*) for the plaintiff.—First, the London Joint Stock Bank, as assignees of the bill of lading, are entitled to the linseed upon the terms therein mentioned. The defendant who signed it was captain and part owner of the ship. The bill of lading in no way refers to the charter-party, with which the Bank has nothing to do. It is a general rule that where a ship is chartered for a particular voyage, for a gross sum by way of freight, if the captain signs bills of lading for the cargo, specifying a rate of freight amounting to a less sum than that mentioned in the charter-party, as against third persons being owners of the cargo, the shipowner has no lien on the cargo beyond the freight mentioned in the bills of lading: *Mitchell v. Scaife* (a), *Gilkison v. Middleton* (b).

(a) 4 Camp. 208.

(b) 2 C. B., N. S., 134.

In *Howard v. Tucker* (a), where a bill of lading, signed by the captain, expressed that freight had been paid, which was contrary to the fact, it was held that the shipowner could not claim payment of the freight from an indorsee for value of the bill of lading. Though, as between the charterers and shipowners, there may be a lien, that does not affect a bonâ fide indorsee for value of the bill of lading: *Brown v. North* (b). [*Bramwell*, B.—The 18 & 19 Vict. c. 111, gives to the indorsee of the bill of lading the rights which he would have had if the contract in the bill of lading had been originally made with himself. What answer would the defendant have had if the plaintiff had sued on the contract, evidenced by the bill of lading, to deliver on payment of the freight mentioned in it?] In *Faith v. The East India Company* (c), all the parties were fully acquainted with the terms of the charter-party, and there was collusion: the judgment assumes that but for those circumstances the owners would have been entitled to the goods on payment of the bill of lading freight. In *Gledstones v. Allen* (d) the plaintiffs were the mere agents of the shipper, and *Jervis*, C. J., said that there was “nothing whatever to liken it to the case of an indorsee for value.” [*Watson*, B. referred to *Campion v. Colvin* (e).] It will be contended that the goods in question were the goods of the charterers, but Stewart & Calrow having purchased them with their own monies and shipped them deliverable to their own order by the bill of lading, the charterers never had any property in them: *Turner v. The Trustees of the Liverpool Docks* (f), *Wait v. Baker* (g), *Van Casteel v. Booker* (h). That alone would distinguish this

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(a) 1 B. &amp; Ad. 712.

(b) 8 Exch. 1; see p. 16.

(c) 4 B. &amp; Ald. 630.

(d) 12 C. B. 202.

(e) 3 Bing. N. C. 17.

(f) 6 Exch. 543.

(g) 2 Exch. 1.

(h) 2 Exch. 691.



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case from *Small v. Moates* (a), where a lien on the lading of a ship having been expressly reserved to the owner, it was held that goods which the charterer purchased and put on board, and then transferred with a stipulation to convey them to their destination for a certain amount of freight, were, even against an indorsee of the bill of lading, subject to the shipowner's lien for a balance due to him under the charter-party. In that case the estoppel by the signing of the bill of lading was not adverted to: the captain had no authority to sign bills of lading, at any rate of freight. That latter point was adverted to by *Cresswell, J.* in *Gledstanes v. Allen* (b). The plaintiffs claimed upon the title of the immediate indorsee of the captain; the captain was also the charterer and shipped his own goods, making them deliverable to his own order at a certain rate of freight, and it is observed in the judgment that this was calculated to provoke some inquiry as to the relation in which he stood with respect to the ship. [*Watson, B.*—A person who might have known, is in the same position as one who actually did know, of the charter-party.]

Secondly, supposing the plaintiff to be bound by the terms of the charter-party, the defendant had no lien. The remainder of the freight being, under the circumstances which have happened, payable in cash two months after the report of the vessel inwards, there could be no lien: *Alsager v. The St. Katherine's Dock Company* (c).

*Montague Smith* (with whom was *Tomlinson*), for the defendant.—First, as to the construction of the charter-party. There is an *express contract* that the shipowner shall have an absolute lien for all freight. To give effect to that, the charter-party must be construed as providing that the

(a) 9 Bing. 574.

(c) 12 C. B. 202, 216.

(e) 14 M. &amp; W. 794.

freight is to be paid on the delivery of the cargo, and that the shipper has no right to insist on the delivery without payment of the freight. In *Alsager v. The St. Katherine's Dock Company* (a), the charter-party contained no clause giving to the shipowner an absolute lien for all freight, and the decision amounts to no more than this, that the Court thought they could not infer that there was to be a lien. [*Watson, B.*—The vessel being reported inwards on the 10th of February, the freight became payable on the 10th of April.] The alleged conversion was not until the 24th of May, after the freight had become due and the bill for the price of the goods had been dishonoured. According to the true construction of the words "payment after right delivery of the cargo," the delivery of the goods and the payment of the freight are to be concomitant acts, which neither party is obliged to perform without the other being ready to perform the correlative act: *Tate v. Meek* (b). [*Channell, B.*—Could the plaintiff have sued for the freight, less the discount, if he had delivered the goods before the expiration of the two months?] Probably not: the option may be only for the benefit of the shipper. But the shipper could not insist on the delivery of the cargo within the two months without payment of freight. [*Bovill.*—In *Crawshay v. Homfray* (c) it was held that where a wharfinger had originally no right, as against the owner, to detain the goods till payment, his subsequent default could not create a lien as against a purchaser from such owner: *How v. Kirchner* (d) is to the same effect.]

Then, assuming a lien for the charter-party freight to have existed, such lien is not defeated by the making of the bill of lading at a nominal freight and indorsing it to

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(a) 14 M. &amp; W. 794.

(c) 4 B. &amp; Ald. 50.

(b) 8 Taunt. 280.

(d) Privy Council, Dec. 8, 1857.

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the Mercantile Bank. *Small v. Moates* (a) is an authority for that proposition. In *Gilkison v. Middleton* (b) the bill of lading was filled up at the current rate of freight; and there was nothing to create any suspicion that the goods might be subject to lien for any other freight. But where a bill of lading makes goods deliverable at a freight of 5s. per ton, the current rate being 5l. 10s., any one taking it would naturally inquire into the circumstances. [*Bramwell*, B.—It only leads to the inference that for some sufficient reason the captain was willing to take 5s. per ton.] The goods, when put on board, became subject to lien. The lien against the charterer was available against Stewart & Calrow. The present plaintiffs took the goods subject to the same rights. Nothing has since taken place to divest the lien which was created in favour of the ship-owners. The right of lien is a right in rem. That appears from *Campion v. Colvin* (c). The London Joint Stock Bank obtained no greater rights than the Mercantile Bank had, because their indorsement was simply for an old balance and not upon a fresh advance. [*Bramwell*, B. Surely there is no weight in that.] *Gledstanes v. Allen* (d) is an authority in favour of the defendant on this point. The distinction between this case and those referred to on the other side is, that here the lien attached before the bills of lading were signed, the goods having been put on board before the bills of lading were presented for signature. [*Watson*, B.—But Stewart & Calrow made advances in order to get the bills of lading.]

*Bovill* was not called on to reply.

(a) 9 Bing. 574.

(b) 2 C. B., N. S. 134.

(c) 3 Bing. N. C. 17.

(d) 12 C. B. 202.

POLLOCK, C. B.—We are all of opinion that the plaintiff is entitled to recover. There are only two points to which it is necessary to allude. First, was the linseed, in the hands of the indorser of the bill of lading, subject to a lien for freight? Secondly, was it so in the hands of the indorsee? Some of my brothers are of opinion that there was no lien, and that the stipulations of the charter-party precluded it. I am strongly inclined to think so; but I prefer to rest my judgment on this ground, that a bonâ fide indorsee for value of the bill of lading, having no knowledge or notice of the charter-party or that the cargo was subject to lien for any freight except that mentioned in the bill of lading, and not acting collusively, is entitled to the goods on payment of the freight stipulated for in the bill of lading, and is not affected by the greater liability of the indorser, supposing such liability to exist. It is impossible to distinguish the case from *Gilkison v. Middleton* (a). That case is a conclusive authority in favour of the plaintiff. It was said that Stewart & Calrow shipped the goods intending them for the charterer, but, though that might at one time have been their intention, it is clear that when the goods were put on board they intended to keep them under their own control. If a shipowner so conducts his business as to permit the master to sign bills of lading at a lower freight than that payable by the charter-party, in consequence of which parties are induced to make advances on such bills of lading, the shipowner is bound. I do not lay stress on the fact that the master was also a part-owner, though, as against him and the other part-owners, it makes the case stronger. It is said that from the small amount of freight mentioned in the bill of lading, the indorsee must have had notice that the sum named was not the true freight for the goods; that suspicions should have been

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(a) 2 C. B., N. S. 134.

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excited, and that it ought to have been assumed that the parties did not mean what they said. But in a Court of law we must presume that persons who sign mercantile documents mean what they say. I rest my judgment on the ground that the London Joint Stock Bank, as the bonâ fide indorsee of the bill of lading without notice, was entitled to the goods on payment of the freight mentioned in it, without being bound to make any inquiries.

BRAMWELL, B.—I am of the same opinion. Notwithstanding Mr. *Smith's* argument, I am against him on both points. The first question is, whether the charter-party creates any lien for the freight. I hold that it does not. The charterer is to pay "the remainder" of the freight "in cash two months from the vessel's report inwards at London or Liverpool, and after right delivery of the cargo." Both stipulations are for the benefit of the charterer. Then comes the provision giving the charterer the option of paying in cash under discount within the two months. Mr. *Smith* says the meaning is, that the charterer is to pay cash at the expiration of two months whether the cargo is delivered or not, but if delivered he is to pay for it on delivery. The language of the charter-party will not bear that construction. My brother *Channell* pointed out that if Mr. *Smith's* view was right, and if the delivery took place within the two months, the shipowner would have a right at once to sue the charterer for the remainder of the freight. Then it was said that it is *expressly* provided that the shipowner shall have "*an absolute lien on the cargo* for all freight, dead freight and demurrage." The true meaning is, that he is to have a lien so far as a lien is possible. The mention of "dead freight and demurrage" excludes freight not due. The shipowner is to have a lien, not only for that freight in respect of which the law would give him a lien,

but also in respect to these other two matters. I think the second point is equally clear against the defendant. The Bank claims to be owner of the goods, and by the bill of lading it appears that the owner is to have them on payment of five shillings per ton. It is a monstrous proposition, that when a person purchases goods upon the faith of a document shewing that he is entitled to the possession of them on payment of a particular sum, the party who signed that document may say "I did not mean what I wrote, but I am entitled to something more." *Gilkison v. Middleton* (a) is in point for the plaintiff. Mr. *Smith* attempted to distinguish it on the ground that in that case there was nothing to excite the suspicion of the indorsee of the bill of lading. But no one is bound to suppose that another means something contrary to what he has said. There is no difficulty in supposing that a person would not ship goods unless he could get a bill of lading at a nominal freight to enable him to discount the bill of exchange drawn against the shipment. There was therefore nothing to lead to the supposition that the owner of the goods was not to have them on the terms mentioned in the bill of lading. Suppose the plaintiff had sued on the contract in the bill of lading: the defendant's answer, if in the same terms as that now set up, would be, not that he had been defrauded, but that he did not mean what he said in his contract. That shews that the defendant's contention cannot be sustained.

WATSON, B.—I agree that our judgment must be for the plaintiff on both points. As to the first, if the words are read in their common and ordinary sense, it is clear the freight is to be paid "in cash two months from the vessel's report inwards at London or Liverpool, and after

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right delivery of the cargo or under discount at 5 per cent. per annum at freighter's option." The freighter is entitled to his goods at once, paying the freight two months after the vessel's report inwards, or he may declare his option to pay ready money; in that case he is to pay the freight less 5 per cent. on the delivery of the goods. It was contended that this construction is inconsistent with the clause that the owner shall have "an absolute lien on the cargo for all freight, dead freight and demurrage." It is impossible that there can be a lien for money not due. The object is not to enlarge the right of lien for freight, but to give a lien for dead freight and demurrage. If the vessel is discharged abroad, the freight is "to be paid in cash on right delivery of the cargo." The clause giving a lien would attach in that case. The meaning is, that wherever there can be a lien the shipowner is to have it, and such lien is to extend to dead freight and demurrage. As to the other point, the master, by the authority of the shipowner, and under the provisions of the charter-party which gave him power to do so, signed bills of lading. Now we know that it is a common thing for masters to sign bills of lading homewards at a nominal freight or no freight. That is done as the shipper might not otherwise be able to obtain advances on his goods, because the amount of the freight might be greater than their value. It was contended that the lien attached before the bills of lading were signed. But the goods were put on board under the contract subsequently signed. Even if the lien did attach as regards Stewart & Calrow, on the indorsement of the bills of lading to a bonâ fide holder the right of lien was divested. It is clear that Stewart & Calrow received advances from the Mercantile Bank on the faith of the bills of lading. Whether the London Joint Stock Bank gave value for them to the Mercantile Bank is not material. The plaintiff is entitled to

the goods on payment of the freight mentioned in the bill of lading.

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CHANNELL, B.—I entirely concur with the rest of the Court. I agree that by the terms of the charter-party there was no lien for the freight: But; apart from that, the London Joint Stock Bank has the rights of an innocent and bonâ fide holder of a bill of lading, signed by the master with the authority of the shipowner. *Gilkison v. Middleton* (a) is in point, and the attempt to distinguish it from the present case has not been successful. Therefore, assuming that the charter-party did stipulate for a lien, such stipulation is not available against the Bank.

Verdict for the plaintiff to stand.

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In the Matter of the Succession of JOHN EMILIUS  
ELWES.

Nov. 25.

**T**HIS was a petition against an assessment made by the Commissioners of Inland Revenue under the Succession Duty Act, 1853, 16 & 17 Vict. c. 51, sects. 45 and 50.

The petition stated that the petitioner was an officer in the 7th Regiment of Foot, serving with his regiment in the East Indies: that he became entitled to certain real property, and certain personal property to be invested in land, for life, on the death of John Meggott Elwes, who died on the 10th of March, 1855, under the will of John Elwes, who died in April, 1817: that in his return for estimating

In estimating the value of a succession to land, under "The Succession Duty Act, 1853," (16 & 17 Vict. c. 51), the successor is not entitled to a deduction for income tax or the agent's charges for collecting rents.



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the succession duty, he claimed a deduction for income tax, at the rate of 1s. 2d. in the pound, in assessing the annual value of this property, and also a deduction of 5L per cent. for an agent's charges for collecting the rents of the landed property: that the Commissioners disallowed both heads of claim; and he prayed that the Court would rescind the assessment of the Commissioners of Inland Revenue, so far as the same omits to make an allowance for the said several parts of the claim, and that the Court would make such order as to them should seem meet.

*Alexander and Theodore Thring* argued for the petitioner in Hilary Vacation, February 9 (a).—By the 21st section of the 16 & 17 Vict. c. 51, the interest of every successor “in real property shall be considered to be of the value of an annuity equal to the *annual value of such property*, after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession, or to the receipt of the income and profits thereof during the residue of his life, or for any less period during which he shall be entitled thereto; and every such annuity, for the purposes of this Act, shall be valued according to the tables in the schedule annexed to this Act.” The section goes on to say that the duty shall be paid at a certain time after the successor shall have become entitled to the *beneficial enjoyment*. By the 2nd section the successor is made chargeable in respect of his *beneficial interest*. Reading the words of the 21st section as explained by the context, “*annual value*” means the *net* annual value, after deducting such charges as income tax, which affect the beneficial enjoyment. If there is a doubt as to the meaning of the Act the petitioner is entitled to the benefit of it. A tax cannot be imposed except by plain and unambiguous

(a) Before *Pollock*, C. B., *Bramwell*, B., *Watson*, B., and *Channell*, B.

words: Dwaris on Statutes, 646. The income tax is also "a necessary outgoing" within section 22, which provides that, "in estimating the value of lands used for agricultural purposes, houses, buildings, tithes, teinds, rent-charges and other property, yielding or capable of yielding income not of a fluctuating character, an allowance shall be made of all necessary outgoings." [*Pollock*, C. B.—The income tax terminates in 1860. Is it proposed to calculate the deduction to 1860 or as a perpetual outgoing?] It was admitted before the Court in Ireland that poor rates, chargeable on the landlord might be deducted, though they might terminate, because under possible circumstances there might be no one chargeable. The income tax is the first tax and charge upon the land. The point now in debate has been expressly decided by the Court of Exchequer in Ireland, in favour of the view presented by the petitioner: *Re Beresford Succession* (a). Possibly, if the income tax should cease hereafter, the petitioner would be liable to additional "duty in respect of the increased value accruing upon the determination of such charge," under the 20th section. [*Bramwell*, B.—Suppose a farm to be so exhausted by bad management that a tenant would not give more than 50*l.* as rent for the first year, it could hardly be contended that the annual value was the value for the first year.] In the case of *In re Mickelthwait* (b), *Alderson*, B., said that the word "value" means "net value." [*Bramwell*, B.—Suppose a man possessed 1000*l.* consols, if your argument is well founded the annual value would be 28*l.* or 30*l.*, according to whether the owner was or was not chargeable with income tax. The mistake appears to be in confounding the annual value of the property with the annual value to the owner of it.] Then as to the commission and agency fees for receiving the rents. In the case in the

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(b) 11 Exch. 452, 454.

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Court of Exchequer in Ireland, receiving the rents by an agent was a matter of personal convenience to the petitioner, who was an adult. Here it is a matter of necessity, because the petitioner was an infant at the time he succeeded to the property, and was abroad. [*Pollock*, C. B.—The outgoings to be allowed are outgoings with reference to the estate, such as repairs and the like, not outgoings having reference to the personal condition of the owner.] “Necessary outgoings” are something more than repairs, because repairs and other such matters are provided for by section 34. In *Louch v. Peters (a)*, upon the gift of an annuity clear of all taxes and outgoings, it was held that legacy duty was an outgoing or tax. Land tax is allowed by the Crown as an outgoing; the only difference between that and the property tax is that the land tax is permanent.

*The Attorney General (Sir R. Bethell)*, with whom were the *Solicitor General (Sir H. S. Keating)*, *E. Beavan* and *Henry Thring*, for the Crown.—On an analysis of the judgment of the Court of Exchequer in Ireland, it will be found that the Court begins by the assumption that the succession duty is a charge on income. They then say, the income tax is also a charge on income; therefore, if the income tax is not deducted before the succession duty is calculated, there is a tax upon a tax. In order to get rid of the supposed anomaly they proceed to inquire whether the income tax is a necessary outgoing or deduction. Then, considering it a case of difficulty, they apply the rule which gives to the subject the benefit of an ambiguity in an act of parliament imposing a tax. Now, the Court of Exchequer in Ireland was mistaken in its first position. The succession duty is not a tax upon income. It is a portion of the principal sum representing the value of the entire

(a) 1 Myl. & K. 489.

succession arrived at by taking such value as equal to that of an annuity of an amount equal to the annual value of such property, subject to certain deductions. The succession duty is, therefore, a part of the whole inheritance. The income tax is a part of the income, and attaches upon income when it gets into the pocket of the recipient. Such income is the annual value of the property. The result is that it is impossible to attribute to a decision so erroneously based the weight which would have attached to it if not founded on a palpable mistake.

The case stood over in order that it might be put into such a form as to give an opportunity of appeal to the Exchequer Chamber, but the petitioner having declined to consent to a special verdict, in Trinity Term (June 9th), Sir *R. Bethell* prayed the judgment of the Court.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

WATSON, B.—This question arose on petition under the Succession Duty Act. The petition prayed to be allowed certain deductions claimed by the petitioner, and disallowed by the Commissioners of Inland Revenue.

The petitioner, in his petition, stated, that he was an officer in the 7th Regiment of Foot, serving with his regiment in the East Indies: that he became entitled to certain real property, and certain personal property to be invested in land, for life, on the death of John Meggott Elwes (who died on the 10th of March, 1855), under the will of John Elwes, who died the 10th of April, 1817: that in his return for estimating the succession duty he claimed a deduction for income tax, at the rate of 1s. 2d. in the pound, in assessing the annual value of this property, and also a deduction of five per cent. for an agent's charges for

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collecting the rents of the landed property : that the Commissioners disallowed both heads of claim ; and he prayed that this Court would rescind the assessment of the Commissioners of Inland Revenue, so far as the same omits to make an allowance for the several parts of the claim, and that the Court would make such order as to them should seem meet.

We are all of opinion that the Commissioners of Inland Revenue were right in disallowing both parts of this claim.

This depends on the provision contained in the Succession Duty Act, particularly on the true construction of the 21st and 22nd sections of that Act. The object of this Act was to extend the principle of the Legacy Duty Acts, "upon and for every succession to the beneficial enjoyment of any real or personal estate, or to the receipt of any portion or additional portion of the income or profits thereof, that may take place upon or in consequence of the death of any person under whatever title, whether existing or future, such succession may be derived." The object of the Act is to levy a duty on all successions to real property ; and on the succession to personal property, devolving by reason of death, under any instrument other than by will or intestacy.

The mode of ascertaining the value of the succession to land (which is a tax on capital and not on income) is prescribed by the 21st section, which provides that the interest of every successor to land "shall be considered to be of the value of an annuity equal to the annual value of such property, after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession, or to the receipt of rents and profits during the remainder of the life, or for any less period during which he shall be entitled thereto." The annuity is to be valued according to the tables mentioned

in the Act; the duty so computed is to be paid by eight half yearly instalments covering four years, provided the successor live so long. By section 29, as regards personal property in trust for investment in land, the succession is calculated as real property. By section 22 an allowance is to be made for all necessary outgoings in estimating the annual value of lands used for agricultural purposes, houses, buildings, tithes, teinds, rent-charges and other property, yielding, or capable of yielding income, not of a fluctuating character. The successor to land is, by these sections, never charged for a greater sum than the value of his life interest. The assessment of the annual value is only in order to fix the duty at the estimated value of his life interest.

The question then turns on the meaning of the words "annual value of the land" in the 21st section, and "an allowance for all necessary outgoings" in the 22nd section. The term "annual value of land" is not a term of art, but means in common parlance the rack rent or the value of the gross produce of the land, minus all payments, expenses, interest, labour and charges on the land, or on the tenant. This has been the mode in which it has been treated in legislation, and in the construction of acts of parliament. Thus, in the income tax on land, which is a charge on the annual value of land in each year, certain rules are laid down to ascertain the annual value. By section 60 of that Act (5 & 6 Vict. c. 35), schedule No. 1, the annual value of lands &c. shall be understood to be "the rent by the year, at which the same are let at rack rent." Also under the Parochial Assessment Act (6 & 7 Wm. 4, c. 96), the net annual value is to be the rent at which the same might be reasonably expected to let from year to year, free of all tenant's rates and taxes and tithe commutation rent-charge, and deducting the probable cost of repairs,

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insurance, and other expenses to maintain the same rent. That being the meaning of "annual value," what is the meaning of the words "*necessary outgoings*" in this statute? "*Necessary outgoings*" would appear to be *permanent* charges, made on the occupiers of the land, or falling entirely on the land, such as repairs, poor rates, highway, sewer, and county rates, town rates, drainage rates and the like; some of which may be payable occasionally, still they are permanent charges, and capable of valuation, so as to render it possible to calculate the annual amount. (See *Rex v. Adames* (a), *Rex v. Joddrell* (b).) In some recent cases (*Regina v. Goodchild* and *Regina v. Lamb* (c)) it was decided that in a poor rate on the rector of a parish in respect of a tithe commutation rent charge, in assessing the value thereof, the tenant's income tax is to be deducted, but not the landlord's property tax. This decision is not within the Parochial Assessment Act; but the Court decided the case by analogy to that Act. This was a rate on the owner, and in respect of the rent, and the income tax was not deducted as a diminution of the annual value.

The income tax is only a charge on the owner in respect of the *annual* value of the land, and by the Acts, not made permanent, but temporary, and varying in amount. This annual value of the land is to be taken as an annuity, so as to calculate the value of the succession by the tables, or in other words—to capitalize the succession. It is not a tax on the annual income, or on income at all, but a mode of estimating the value of the succession.

Has the legislature used these terms, "annual value" or "*necessary outgoings*" from the annual value in any other than the ordinary meaning? The 22nd section of the Succession Duty Act does not say the outgoings are to be

(a) 4 B. &amp; Adol. 61.

(b) 1 B. &amp; Adol. 403.

(c) 27 L. J. M. C. 233.

deducted in estimating the annual value of any particular year, but in estimating the annual value generally. That these words are used in the ordinary sense is obvious, from this, that annuity or annual value is, by the Tables, taken at a certain number of years purchase, as the estimated value of the succession to be charged with duty; for several of those years there may be no income tax at all, and for other of those years, an income tax, at a lower rate than the income tax chargeable at the time of the assessment, may be payable. It is impossible therefore to say that where no income tax at all is payable, or paid, during a portion of the number of years, on which the calculation is made, it is a "necessary outgoing" when it is no outgoing at all. It is reasonable to suppose, that if the legislature meant that the tax on the income of the *landlord* was to be deducted, on finding the annual value of the *land*, it would have been expressly stated or alluded to in the Act.

Some light may be thrown on this point, by reference to the Legacy Duty Act, which is the foundation of the present Act and *in pari materia*; in fact they form the code applicable to the taxes imposed on succession to real and personal property by death. By the Legacy Duty Act, where a gross sum, as personal property, comes to a legatee or successor absolutely, the duties would be chargeable on the whole sum. By 36 Geo. 3, c. 52, s. 8, the value of any legacy given by way of annuity for any life, &c., shall be calculated, and the duty chargeable thereon shall be charged, according to the tables in the schedule. Under this Act, at the present day, the value of the annuity would be estimated without any reference to income tax. And by the 12th section of that Act, where the legacy is to be enjoyed by several persons in succession, such persons are to be charged in succession, in the same manner as if the *annual produce* had been given by way of

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annuity. It is clear that, under this provision, no income tax would be deducted in arriving at the term "*annual produce*." (See sections 2 and 8, Legacy Duty Act). Looking at sections 30 and 31 of the 16 & 17 Vict. c. 51 (Succession Duty Act, 1853), where there is a succession to personal property not absolute, and not chargeable with legacy duty, "each successor's interest shall be considered to be of the value of an annuity, payable during his life, &c., equal in amount to *the annual produce of the actual trust property* at the time of his becoming entitled in possession." These provisions are all in *pari materia*, and it is worthy of observation that the two Acts are in the same words. The result of these Acts is, that an annuity, as a legacy, is valued without reference to any deduction for income tax; and so are legacies, where the interest is chargeable in succession, valued without reference to income tax; and as the 30th and 31st sections of the Succession Duty Act are in the same words, it would follow they should be calculated in the same manner. From this view of the two Acts it seems to follow, that the assessment of the value of the succession on land, under the 20th and 21st sections, would be the same as under the 30th and 31st sections on personalty, and on legacies of the like nature under the 36 Geo. 3. The income tax is on the produce of personalty, and so it is on the annual value of land. The produce and annual value are to be taken as the foundation for assessing the value of the succession.

We are, for these reasons, of opinion that the determination of the Commissioners was right, and income tax should not be deducted in finding the annual value of the land, or deducted from the annual value as a necessary outgoing.

We are also of opinion that the expenses of an agent should not be deducted. The petitioner may return from

India to-morrow, and this is not an outgoing at all, certainly not "a necessary outgoing."

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On hearing the argument, we were all of the opinion now stated; but on account of a decision of the Court of Exchequer in Ireland, and in deference to that Court and to the opinion of the very learned and eminent persons who were the Judges taking part in that decision, we have taken time to consider our judgment; and after very great deliberation, we retain the opinion that we ought not to act upon the decision in the Court of Exchequer in Ireland. In the first place in that judgment, *Re Beresford Succession* (a), the Court treats the tax rather as a tax upon income than a tax upon capital. Even as a tax on income we could not have come to the same conclusion as the Court of Exchequer in Ireland. That Court has attached much importance to a rule that a charge or tax must be imposed in clear words. That is no doubt a well established rule; but it is also a rule of construction that a Court must give full effect to the words used in their clear and ordinary signification; and as we see no difficulty in the terms used by the legislature, either in their ordinary and usual signification, or construed with reference to the intent and meaning of these Acts, and of the Legacy Duty Acts, we can only construe them in their ordinary sense and meaning.

The Court of Exchequer in Ireland seem to have been influenced, in their judgment, by this, that the effect of not deducting the income tax would be, to render this a tax upon a tax paid. Even supposing this was a tax upon the annual value, there would be no reason why there should not be two taxes on the same subject-matter. But this is not so, for the succession duty is a tax on capital; the income tax a tax on income. We cannot accede to an argument, in

(a) 5 Irish Com. Law Rep. 407.

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that judgment, that the income tax is a "charge, estate or interest" under the 20th section of the Succession Duty Act. The income tax is a tax payable by all, and not a particular charge created, which is the meaning of sect. 20. We had wished that this case should have been taken to a Court of error, but as no writ of error or appeal will lie on our judgment, we are obliged to give judgment according to what we consider to be the true construction of the Act. For the above reasons we think that the petition should be dismissed, but without costs, as it was founded on the judgment of the Court of Exchequer in Ireland.

Petition dismissed.

No. 10. **BELL and Another, Assignees of BATLEY, a Bankrupt, v. THE BANK OF LONDON.**

A., being owner of a ship which was unfinished, on the 5th of July mortgaged it to B. A., on the 5th of August, registered the ship as owner pursuant to The Merchant Shipping Act, 1854, (17 & 18 Vict. c. 104), s. 42. On the following day B. caused the mortgage to himself to be inserted on the register. A. having become bankrupt:—

**T**ROVER by the plaintiffs, as assignees of Batley, a bankrupt, for a ship called "The City of Brussels."

Pleas.—First, not guilty. Secondly, that the ship was not the ship of the bankrupt.

At the trial before *Pollock*, C. B., at the London sittings after Trinity Term, it appeared that the bankrupt, being the owner and builder of a ship, which was unfinished and had never been registered, on the 15th of July, 1857, by an instrument, headed "Mortgage to secure account current," (fully setting forth all particulars relating to the ship, and describing her by the name of "The City of Bruxelles:") after reciting that he was indebted on bills discounted, &c., covenanted to pay the money due on that security to the

— *Held*, that A.'s assignees could not maintain trover against B. for the ship.

Bank of London on demand; and he did thereby "mortgage to the said Bank, their successors, &c., the sixty-four sixty-fourth parts or shares of which he was the owner in the ship therein described," &c. On the 5th of August Batley registered "The City of Brussels" as follows:—

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Copy Register for transmission to Chief Registrar of Shipping.

| Official number of ship, 19,597.                                          |                                                               | Name of ship, <i>City of Brussels</i> .    |  |
|---------------------------------------------------------------------------|---------------------------------------------------------------|--------------------------------------------|--|
| Port number, 211.                                                         | Port of registry, <i>London</i> .                             | British or foreign built, <i>British</i> . |  |
| Whether a sailing or steam ship; if steam, how propelled, } <i>Sails.</i> | Where built, { <i>South Shields, in the County of Durham.</i> | When built, <i>11th July 1857.</i>         |  |

(Then followed her description, tonnage, measurements, &c.)

| Names, residence and description of the owner, and number of sixty-fourth shares held by each owner. |
|------------------------------------------------------------------------------------------------------|
| <i>Richard Batley, of 31, Gifford Street, &amp;c., Merchant, Sixty-four Shares.</i>                  |

Dated *5th of August 1857.*

Registrar, *G. Evans Jr.*

On the 6th of August the defendants registered the mortgage to themselves as follows :

Copy transactions subsequent to registry, for transmission to Chief Registrar of Shipping.

| <i>Interest continued.</i> |             |                                            |                         | Name of Ship, <i>City of Brussels</i> .   |                                           |                              |
|----------------------------|-------------|--------------------------------------------|-------------------------|-------------------------------------------|-------------------------------------------|------------------------------|
| Number of transaction.     | Letter, &c. | Name of person from whom title is derived. | No. of shares affected. | Date of registry.                         | Nature and date of transaction.           | Name, &c. of transferee, &c. |
| 1                          | A           | <i>Richd. Batley.</i>                      | 64                      | <i>6th of August, 1857: 15 to 12 a.m.</i> | <i>Mortgage. Date 15th of July, 1857.</i> | <i>The Bank of London.</i>   |

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Batley was adjudicated a bankrupt in September, and after his bankruptcy the defendants sold the ship. On these facts the defendants' counsel submitted that there was no evidence to go to the jury, and the learned Judge being of that opinion, the plaintiff was nonsuited.

*Bovill* now moved to set aside the nonsuit and for a new trial.—The learned Judge was wrong in holding that there was no evidence of the plaintiffs' title. By the registry of the ship in the name of the bankrupt on the 5th of August, and by the operation of the 43rd section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), the bankrupt, as registered owner, "acquired power absolutely to dispose of the ship," and became to all intents the owner, notwithstanding any equity that might have previously existed or be then subsisting in respect of the mortgage. Inasmuch as after such registration he did not execute any transfer to the defendants, the registration of the previous mortgage was wholly inoperative. Therefore, on his bankruptcy, the property in the ship passed to the plaintiffs, his assignees. [*Watson, B.*—By section 43 the bankrupt became owner "subject to any rights or powers appearing by the register book to be vested in any other party:" that is, subject to the mortgage which, when the registry was completed, appeared on the register.] The bankrupt's title was complete by the registry on the 5th. On that day he might have sold the ship to any person. After his title was completed he could only dispose of the ship in the manner pointed out by the 55th section of the Act. In *Coombs v. Mansfield* (a) it was held that where a mortgagee of a ship with notice of a prior equitable mortgage, registers, the prior equitable mortgagee is postponed to him. [*Pollock, C. B.*—In that case the equitable mortgage did not appear on the

(a) 3 Drewry, 193.

register itself. Where the ship is still incomplete, a mere congeries of timbers, the owners may sell or mortgage her without registering. *Channell, B.*—Looking at the 43rd section it does not appear that the registered owner is to be taken to be the sole owner.] The object and policy of the Act is to make the register conclusive evidence of ownership. The effect is, that if there has been a registration the only means of acquiring a title is by transfer from the registered owner.—Secondly, the transfer is insufficient to pass the property in the ship which was registered. “The City of Bruxelles” was mortgaged to the defendants. “The City of Brussels” was the ship registered. [*Pollock, C. B.*—Before registration an unfinished ship need not be called by any name. *Watson, B.*—The registration of the bill of sale accords with the registry of the ship.]

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*POLLOCK, C. B.*—We are not bound by this Act to adopt the construction suggested by Mr. *Bovill*, which would work great injustice. It is said that such construction is according to the policy of the legislature. Now I can understand public policy, but not the policy of an act of parliament, beyond what the legislature has said in the Act. The next objection is that the name of the vessel on the registry is not the same as that in the mortgage. But Bruxelles and Brussels are substantially the same, and it is not necessary to give an opinion as to what would have been the effect if the names had been clearly different. The mortgage is entered on the register as a mortgage of “The City of Brussels;” it was the mortgage of that vessel under the name of “The City of Bruxelles.”

*BRAMWELL, B.*—As to the first point, the objection is that when a ship is registered the property can only pass by bill of sale duly registered, and that, if no bill of sale is made and registered subsequently to the registry of

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the ship, the property remains in the registered owner. I do not agree to that. If prior to registration the owner has executed an instrument which, if executed after registration, would pass his interest, and that is registered, it is sufficient. As to the name, the registry is right, and, as the mortgage was made before registration, it matters not by what name the vessel is described in it.

WATSON, B.—The facts are simply these. A ship not then finished was mortgaged by the builder in that state. The builder being owner afterwards registered the ship as owner, and then the mortgagee, in order to complete his title, registered the mortgage to himself. That will appear to be the proper mode of proceeding if the 43rd section is compared with sections 58, 60, 66, 67, 70 and 72. The 43rd section provides that the registered owner shall have power to dispose of the ship, “subject to any rights and powers appearing by the register book to be vested in any other party;” that is to say, in the present instance, to the right of the mortgagee. As to the name, there is really no difficulty in consequence of the name in the mortgage differing from that on the register, because the identity of the thing is not doubtful: the two words are the same name spelt in different ways.

CHANNELL, B.—I agree that there ought to be no rule. It is not necessary to give any opinion as to what would have been the effect of a sale by the bankrupt after the registration of the ship and before the registration of the mortgage. The question is whether the assignees under his bankruptcy are entitled to it. The answer to that is, that the mortgage, having been registered before the bankruptcy, is not invalid, though it was executed before the registration of the ship.

Rule refused.

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## LAFONE v. SMITH and Others.

Nov. 3.

**C**ASE for a libel, published in a newspaper called "The Liverpool Mercury," charging the plaintiff with drunkenness.

**Plea.**—That the libel complained of was inserted in a public newspaper, and that it was inserted in such newspaper by the defendants without actual malice and without gross negligence, to wit, in the publication of a *bonâ fide* report of the proceedings at the election of a town councillor, at Vauxhall Road in the borough of Liverpool, in which a person whom the reporter of the said newspaper *bonâ fide*, but erroneously, believed to be the plaintiff took part: that before the commencement of the action the defendants inserted in the number of the said newspaper, published on the day after the publication of the said libel, a full apology for the said libel, and the defendants now bring into Court here 40*s.*, by way of amends for the injury sustained by the plaintiff by the publication of such libel; and the defendants say that the said sum is sufficient to satisfy the plaintiff's claim in respect of the matter pleaded to.

**Replication.**—The plaintiff denies the whole of the defendants' plea.

At the trial before *Martin*, B., at the last Liverpool Assizes, it appeared that an apology was inserted in very small type amongst the notices to correspondents in the paper of the day following the publication of the libel. The plaintiff stated that he had looked for it but could not find it. Other witnesses stated that they had seen the libel but not the apology. The defendants proved that the report was correct except as to the person, some other person having been mistaken by the reporter for the plaintiff.

To an action for libel in a newspaper, the defendant pleaded, under the 6 & 7 Vict. c. 96, s. 2, that the libel was inserted without malice and without gross negligence, and that he inserted a full apology: and he paid 40*s.* into Court.

The apology was inserted in small type amongst the notices to correspondents. The jury found that the apology was sufficient in its terms but that the type should have been larger, and that the apology should have been inserted in a more prominent part of the newspaper: that the 40*s.* paid into Court was sufficient to cover the actual damage: that there was no malice and no positive negligence.—*Held*, that on this finding the plaintiff was entitled to a verdict with nominal damages.



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The jury found that the apology was sufficient in its terms but that the type should have been larger, and that the apology should have been inserted in a more prominent part of the paper. They also found that the 40s. paid into Court was sufficient to cover the damage; and that there was neither actual malice nor positive negligence. The learned Judge directed a verdict to be entered for the plaintiff with 1s. damages, but reserved to the defendants leave to move to enter the verdict for them or to strike out the entry of damages.

*Atherton* now moved accordingly.—By the 6 & 7 Vict. c. 96, s. 2, “In an action for a libel contained in any public newspaper or other periodical publication,” the defendant may plead “that such libel was inserted in such newspaper, &c., without actual malice, and without gross negligence, and that, before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper, &c., a full apology for the said libel, &c. : and every such defendant shall, upon filing such plea, be at liberty to pay into Court a sum of money, &c. ; and such payment into Court shall be of the same effect, &c. as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into Court under an Act (3 & 4 Wm. 4, c. 42).” In the present case a full apology was inserted *bonâ fide*. It was, therefore, sufficient within the meaning of the section in question, which says nothing as to the type which should be employed. In any case the plaintiff is not entitled to damages, the jury having expressly found that he has not sustained any beyond the 40s. paid into Court.

POLLOCK, C. B.—There will be no rule. An apology means the insertion of something which may operate as an

apology. Inserting an expression of regret in small type, suitable only to a notice to correspondents, amounts to this, that the defendant did not insert an apology.

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BRAMWELL, B.—I am of the same opinion. Inserting an apology means effectually inserting it; not so that people would not be likely to see it; but in such a manner as to counteract as far as possible the mischief done by the libel. Here the jury found that the type should have been larger, and the apology inserted in a more prominent part of the paper. Now, if this is a question of fact, I am not dissatisfied with the verdict. If it is a question of law, I hold that when an apology, instead of being put in a part of the paper addressed to the public at large, is inserted amongst notices addressed only to particular correspondents, where ordinary readers of news would not see it, it is not sufficient. After such a mistake as that in the present case, it was the duty of the defendants to have inserted the apology in the most conspicuous manner.

WATSON, B.—The apology ought to have been inserted in such a manner as to attract public attention to it. The jury found that it was not put in a proper place. One would think that the right place would be at the head of the local intelligence. In ordinary cases people do not trouble themselves to read notices to correspondents.

CHANNELL, B.—The plaintiff was entitled to damages for the publication of the libel unless his case was answered by the plea. Now the effect of the finding is, that a material allegation in the plea, viz., as to the insertion of an apology, was not proved. The plea being disproved, the plaintiff remains unanswered, and was therefore entitled to have the verdict entered according to the direction of the learned Judge.

Rule refused.

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Nov. 12.

EASTWOOD and Another v. BAIN and Others.

A bill drawn on the R. S. G. Company, Limited, by a shareholder in that Company, was accepted—

“ W. Ellis, secretary, by order of the R. S. G. Company, Limited.”

This acceptance was in fact written by order of certain directors of the Company. At the time when the bill became due the Company was insolvent. In an action by a second indorsee of the bill, (who did not shew that either he, or the first indorsee had given value to the drawer,) against the directors, who authorized the acceptance, alleging in one count that they accepted the bill, and in another charging them with falsely representing that they had authority on behalf of the Company to accept it:—

*Held*, first, that the defendants were not liable as acceptors. Secondly, that, assuming there had been a false representation, the plaintiff not having proved that he thereby sustained damage, the defendant was entitled to a verdict.

**DECLARATION.**—The first count stated that one J. A. Scott, on the 22nd of July, 1857, by his bill of exchange, now overdue, directed to the defendants under the name, style and description of the Royal Surrey Gardens Company, Limited, required the defendants to pay to his order 500*l.* two months after date, and the defendants, under the said name, style and description, by one W. Ellis their agent in that behalf, accepted the said bill: that J. A. Scott indorsed to Pritchard, and Pritchard to the plaintiffs; but that the defendants did not pay the same.—Second count: That the defendants, assuming to be and acting as directors of a Company by them called the Royal Surrey Gardens Company, Limited, falsely pretended that they had authority on behalf of the said Company to accept, and to order the said W. Ellis (assuming to be and acting as secretary of the said Company) to accept, the said bill on behalf of the said Company; which the said W. Ellis, assuming and acting as aforesaid, then did; whereby the plaintiffs, relying on the said acceptance, were induced to, and did, believe that the same was duly authorized by the said Company, and did then receive and take the said bill so indorsed to them as aforesaid for and in respect of certain value by them to the said Pritchard given; whereas in fact the defendants had not authority to accept, or to order the said W. Ellis to accept, the said bill on behalf of the said Company, as the defendants at the time of the said order well knew; and the said bill always hath been, and

is, unavailable and not binding on the Company, and the same was accepted without their authority, and the said bill, though indorsed, remains unpaid, &c.

Pleas: to the first count.—Traverse of acceptance. To the second count.—First: Not guilty. Secondly: That the plaintiffs did not, in reliance upon the said acceptance and believing that the same was duly authorized by the Company, receive or take the bill so indorsed as in that count mentioned.

At the trial, before *Pollock*, C. B., at the Sittings in London after Trinity Term, it was proved that one J. A. Scott, having been employed by the Surrey Gardens Company, Limited, to build refreshment rooms, drew upon the Company a bill of exchange, which was accepted, as follows:

£500. Received by order of the Royal Surrey Gardens Company, Limited. Payable at Messrs. Cocks, Biddulph & Co. London, 22nd July, 1857.  
Two months after date, I pay to my order the sum of five hundred pounds.  
JOHN WILLIAM SCOTT,  
Secretary,  
New Inn Yard.  
To the Royal Surrey Gardens Company, Limited.

The bill was indorsed by Scott to Pritchard and by Pritchard to the plaintiffs. Ellis, the secretary, proved that the bill was accepted by the authority and order of the defendants, who were three of the directors of the Company. The order appeared in the minute book of the Company. The Company was registered, as a Company with limited liability, on the 17th of April, 1856. Scott, the drawer, was a shareholder. The Company was proved to have been insolvent when the bill became due. Neither Pritchard nor the plaintiff were called to prove that they gave value for the bill. By the 90th clause of the

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deed of settlement, it was provided "that the directors shall not issue or accept any promissory notes or bills of exchange for or on behalf of the Company; but they may receive promissory notes and bills of exchange for the Company, and such notes and bills may be indorsed in the name of the Company by the secretary and one of the directors for the time being," &c.

The defendants' counsel submitted; first, that the defendants were not liable as acceptors of the bill; secondly, that it was not proved that they had made any representation with respect to the bill, and that Scott the drawer, being a shareholder, must have known that the defendants had no power to accept or authorize Ellis to accept the bill; thirdly, that it was not shewn that the plaintiffs had sustained any damage, the Company having been insolvent when the bill became due. The learned Judge directed a verdict for the plaintiffs with 500*l.* damages, reserving leave to move to enter the verdict for the defendants.

*Edwin James* having obtained a rule nisi to enter the verdict for the defendants, or to reduce the damages to a nominal sum,

*Overend and Barstow* now shewed cause.—The bill is not binding on the Company. The acceptance must be read, "accepted on behalf of the Company by the authority of the Company." That is a false representation on the face of the bill. It may be that both Scott, who was a shareholder, and the defendants knew that the defendants, as directors, had no power to authorize Ellis to accept the bill; but on the principle of *Polhill v. Walker* (a), the representation appearing on the face of the bill must be considered as made to all who received it in the course of its circulation. The representation need not be made

(a) 3 B. & Ad. 114.

to a particular person, if when made it was intended to circulate in the commercial world: *Gerhard v. Bates* (a). The plaintiffs are at least entitled to a verdict for nominal damages.

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*Edwin James, Hale, and R. E. Turner*, in support of the rule.—In actions for false representation nominal damages do not follow as a matter of course. If damage is not shewn to have resulted from the false representation there is no ground of action. Here it was not proved that the plaintiffs gave value for the bill, and therefore the allegations traversed by the last plea were not proved.—They referred to *Taylor v. Ashton* (b), and 1 Wms. Saund. 230, note 4.

POLLOCK, C. B.—The rule must be absolute to enter the verdict for the defendants. The first count is on the bill of exchange. As to that, the acceptance was not the acceptance of the Company, or of the defendants who were charged as acceptors. No person can accept a bill of exchange except the person to whom it is addressed, unless he accepts for the honour of the drawer. The plaintiffs therefore must fail on that count. The second count is for a false representation. That is a case where an action does not lie, whether the defendants have been guilty of fraud or not, unless the plaintiffs have sustained damage. Here it was consistent with the evidence that the plaintiffs may have been the mere puppets of Scott.

BRAMWELL, B.—It is clear that this was not the acceptance of the defendants. That disposes of the first count. As to the second, the plaintiffs have not proved that they sustained any damage from the wrongful act. This is an action to recover the damage done by the act

(a) 2 E. & B. 476.

(b) 11 M. & W. 401, 415.

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complained of, which, unless damage result from it, is not actionable. The action is in effect for the special damage, and the plea of "not guilty" is a denial that the damage alleged was caused by the defendants' conduct: *Wilby v. Elston (a)*.

WATSON, B.—I am not satisfied as to the meaning of the second count, but, taking it as charging fraud and that the false representation follows the bill, the plaintiffs must shew that they were defrauded. The rule deducible from *Langridge v. Levy (b)*, and the cases there referred to, is, that when the action is not upon a contract, in order to constitute a cause of action for false representation the plaintiff must prove that the defendant was guilty of fraud, and that he has sustained damage, the result of that fraud. Here there was no direct communication between the plaintiffs and the defendants. It is only because the bill came into the plaintiffs' hands that it is said that the plaintiffs are damnified. But in an action of this sort it will not be presumed that a plaintiff has given value merely because the bill is produced by him. There is no doubt but that if Pritchard or the plaintiffs had given value for the bill they would have been called to establish the fact.

CHANNELL, B.—I also think that the rule must be absolute. It is not necessary to decide whether the bill is good or bad as against the Company. As to the special count, the declaration alleges that the defendants falsely pretended that they had authority, on behalf of the Royal Surrey Gardens Company, Limited, to accept, and to order Ellis to accept, the bill on behalf of the Company. Now, assuming that there may have been a false representation which would in certain events have given a right of action to the

(a) 8 C. B. 142.

(b) 2 M. & W. 519.

plaintiffs, the defendants are clearly entitled to a verdict on the last issue, because there was no evidence to sustain a verdict for the plaintiffs on that issue: in fact the defendants are entitled to a verdict on all the issues.

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Rule absolute.

VAUGHAN v. THE TAFF VALE RAILWAY COMPANY.

Nov. 20.

THE first count stated, that the plaintiff was possessed of a wood near to a railway used by the defendants for the purpose of propelling along the same divers locomotives and steam engines containing fire and igneous matter: that the defendants, by their servants, so negligently and improperly managed a certain locomotive or steam engine, which was then being by them propelled along the said railway near to the said wood, and the fire and igneous matter therein, and so negligently conducted themselves in and about providing and managing the proper means for retaining the fire and igneous matter in the said locomotive whilst the same was being propelled along the railway, that by such negligence and improper management, divers sparks of fire and igneous matter escaped and flew out of the said locomotive and settled in the said wood and the land adjoining thereto of the plaintiff, and by means thereof the said wood became and was ignited, and eight

A wood adjoining the defendants' railway was burnt by sparks from the locomotives. On several previous occasions it had been set on fire, and the Company had paid for the damage. Evidence was given that the defendants had done everything that was practicable to the locomotives to make them safe, but it was admitted that with these precautions the locomotives had been the means of occasionally setting fire to

the wood. The banks of the railway were covered with inflammable grass. The jury found the Company guilty of negligence.

*Held:* First, that, assuming the fire to have been caused by lighted coals from the locomotives falling in the plaintiff's wood, the defendants were liable.

Secondly, that they were not excused by the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 86.

Thirdly, that if the fire broke out on the defendants' land and was communicated to the wood from the banks of the railway, there was evidence to justify the verdict; and that the defendants were not protected by the 14 Geo. 3, c. 78, s. 84.

Fourthly, that it was no defence that the plaintiff had allowed his wood to become peculiarly liable to take fire by neglecting to clear away the dry grass and dead sticks.



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acres of the trees were consumed, &c.—Second count: that the plaintiff was possessed as in the first count mentioned, and the defendants were possessed of a certain bank which separated the railway from the wood, upon which bank grass, herbage and other combustible matter were growing, and upon which bank, from time to time, fell and settled, as the defendants well knew, large quantities of red hot ashes and cinders which from time to time escaped and flew from and out of the said locomotives in the course of the same being propelled along the railway by the defendants and their servants; and there was, by reason thereof, at the times when such locomotives were being propelled along the railway, and by and near the said bank, as the defendants well knew, great danger that the grass, herbage and combustible matters upon the said bank would be ignited, and that a fire would be thereby occasioned, which would be in great danger of extending to the plaintiff's wood and setting fire to the same, unless the said bank were kept in such a state and condition that the grass, &c. on the same should not be liable to be ignited by the means aforesaid, or unless due and reasonable precautions were taken by the defendants to prevent any fire upon the bank, occasioned by the means aforesaid, extending to the wood; and thereupon it became the duty of the defendants, when locomotives were being propelled along the railway, and near the said bank and wood, to preserve and keep the bank in such a state and condition that fire should not be occasioned by reason of the ashes, &c., falling and settling thereon from and out of the locomotives, and to take all necessary precautions to prevent any fire which might be occasioned from extending to, and burning the wood of the plaintiff. That at the time of the grievances, the defendants, by their servants, were propelling locomotives containing hot ashes along the railway near to the

said bank and wood; that a quantity of red hot ashes escaped out of the locomotives and fell on the bank: that the defendants so negligently and improperly kept the bank, and suffered the same to be in such a bad and improper state, that in consequence thereof the grass, herbage and combustible matters on the bank caught fire, and by reason of the defendants not having taken any due or reasonable precaution to prevent the said fire, or any fire that might be occasioned as aforesaid, from extending from the said bank to the plaintiff's wood, but having negligently and improperly omitted to do so, the said fire, so occasioned as aforesaid, did extend to the plaintiff's wood and burnt eight acres thereof, &c.

Plea: Not guilty.

At the trial, before *Bramwell*, B., at the Glamorganshire Spring Assizes, it appeared that the action was brought to recover damages for the burning of a wood on the Aberdare branch of the Taff Vale Railway. When the fire was discovered, at noon on the 14th of March, 1856, several trains had recently passed. The bank, which consisted of peat, was burning. There were traces of fire from the bank to the wood, and the long grass on the bank was burnt. In the plaintiff's wood there was a great quantity of dry grass, of a highly inflammable nature. The wood had been frequently set on fire by sparks from the locomotives, and on four occasions the defendants had paid for the damage. In 1853 the plaintiff wrote to the secretary of the Company:—"No fire was known in the memory of man in the wood before the Aberdare railway was made. Since it has been made, four or five times the wood has been ignited. Any one looking at it can easily satisfy himself that in a dry season the wood is in just about as safe a state as a barrel of gunpowder at Cyfarthfa Rolling Mill." The plaintiff had taken no steps to clear away the accumulation

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of dry grass and fallen branches in the wood. The defendants gave evidence to shew that they had taken every precaution in their power to prevent the engines from emitting sparks, which they could take consistently with the working of the line.

On these facts the defendants' counsel submitted that there was no negligence on the part of the Company; but the learned Judge told the jury that he should be prepared to decide that the defendants were liable, and he directed them that if, to serve his own purposes, a man does a dangerous thing, whether he takes precautions or not, and mischief ensues, he must bear the consequences: that running engines which cast forth sparks is a thing intrinsically dangerous, and that if a railway engine is used, which in spite of the utmost care and skill on the part of the Company and their servants is dangerous, the owners must pay for any damage occasioned thereby. His Lordship pointed out to them that by keeping the grass on the banks of the railway close cut, or by having the banks formed of gravel or sand so as to make a non-inflammable belt, all danger might be avoided: and he asked them whether they did not think that there was inevitable negligence in the use of a dangerous thing calculated to do, and which did cause, mischief. The plaintiff's counsel asked that a question should be left to the jury, whether the plaintiff had not been guilty of negligence in permitting the wood to be in a combustible state by not properly clearing it. The learned Judge refused, saying that he thought that there was no duty on the part of the plaintiff to keep his wood in any particular state. The jury found a verdict for the plaintiff.

*J. Evans*, in Easter Term, had obtained a rule for a new trial on the ground that the verdict was against evidence, and that the learned Judge misdirected the jury in telling them that no care or skill used in preventing the escape of

fire from the engine would be an answer to the charge of negligence, provided they did not succeed in preventing it, and also in telling the jury that the conduct of the plaintiff in allowing his wood to be in such a combustible state was not material.

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*Grove* and *Giffard* shewed cause (a).—The position of the defendants is analogous to that of a person who keeps a dangerous animal, such as a tiger, with knowledge of its propensities. Such a person is bound to secure it at his peril, and if it does mischief negligence is presumed. [*Pollock*, C. B.—In that case the keeping of such an animal after notice is negligence. Here, however, the Company are empowered to run locomotives on the line, which is an important distinction: *Rex v. Pease* (b).] In *Gibson v. The South Eastern Railway* (c) *Watson*, B. ruled that, in an action against a railway company for carelessly letting sparks fly from their engines so as to set fire to the herbage, it is not necessary to prove any specific act of negligence. That accords with the opinion of *Martin*, B., in *Blyth v. The Birmingham Waterworks Company* (d). In Com. Dig. "Action on the Case for Negligence," (A 6) it is said:—"An action lies, upon the general custom of the realm, against the master of a house if a fire be kindled there and consume the goods of another" (e). In *Turbervil v. Stamp* (f) the Court say of the fire in a man's field, "he must see it does no harm and answer the damage it does." [*Bramwell*, B.—The observation appears to be extra-judicial.] The question arose after verdict on a declaration which stated that the defendant *negligenter custodivit ignem suum*

(a) In Trinity Term, May 27.  
 Before *Pollock*, C. B., *Martin*, B.,  
 and *Channell*, B.

(b) 4 B. & Ad. 30.

(c) 1 Fos. & Fin. 23.

(d) 11 Exch. 781; see p. 783.

(e) Citing *Beaulieu v. Finglam*,  
 2 H. 4, f. 18, pl. 6.

(f) 1 Salk. 13.

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*in clauso suo*. That allegation does not mean more than that the defendant did not keep his fire within his own close. To put that sense on the declaration is to construe it in accordance with the ruling in *Beaulieu v. Finglam* (a), because if the law is as there stated the allegation of negligence is mere form, as it is in an action on the case against a carrier. *Filliter v. Phippard* (b) shews that the statute 14 Geo. 3, c. 78, s. 86, does not affect the liability of a person on whose estate a fire is produced by negligence, or lighted intentionally. Nor, by parity of reasoning, does it apply where the fire is occasioned in consequence of the use of a dangerous instrument by the owner or his servants. [*Pollock, C. B.*, referred to 1 Black. Comm. 431, and *Martin, B.*, to *Viscount Canterbury v. The Attorney General* (c).]

*J. Evans* and *F. Lloyd*, in support of the rule.—First, assuming that sparks from the engine set fire to the wood. The ruling amounts to this: that the railway Company, having taken every precaution to prevent accidents, are to be made responsible if sparks from their engines set fire to crops on the adjacent lands. But the negligence which alone would have rendered the defendants liable was thus defined by *Alderson, B.*, in *Blyth v. The Birmingham Waterworks Company* (d):—"Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." [*Bramwell, B.*—Suppose a person, galloping through a public street to fetch a surgeon in a case of emergency, rode against another: that would be negligence for which the rider would be responsible, though perhaps unavoidable, and though he would

(a) 2 H. 4, f. 18, pl. 6.

(b) 11 Q. B. 347.

(c) 1 Phillips, 306, 315.

(d) 11 Exch. 781.

be acting as a reasonable man would.] *Figgott v. The Eastern Counties Railway* (a) and *Aldridge v. The Great Western Railway* (b) lead to the inference that, as precautions had been adopted by the Company reasonably sufficient to prevent accidents, they were not liable. *Rex v. Pease* (c) shews that the legislature must be taken to have contemplated the possibility that accidents would arise in consequence of the exercise of the powers conferred on railway companies. The case is not analogous to that of keeping a tiger, because there the wrongful act, if any, is in keeping the animal at all; here in the use of an engine which the legislature has authorized the defendants to run on their line: 8 & 9 Vict. c. 20, s. 86. [*Bramwell*, B.—In *Manley v. The St. Helen's Railway and Canal Company* (d) *Pollock*, C. B., said:—"Though the legislature permits the Company to do the various acts described in their statutes, they are to be considered as persons doing them for their own private advantage, and are therefore personally responsible if mischief arises from their not doing all they ought."]

Secondly, assuming the fire to have commenced on the defendants' banks, and from thence to have communicated to the plaintiff's wood; the defendants are not liable, except for negligence. If there was no actual negligence in producing or keeping such fire, the case is within the 14 Geo. 3, c. 78, s. 86: *Filliter v. Phippard* (e). The question whether there was such negligence should have been left to the jury.

Lastly, the plaintiff himself, in allowing the long grass to remain till it was dry and highly combustible close to the bank of the railway, by his own negligence contributed to

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(a) 3 C. B. 229.

(b) 3 Man. &amp; G. 515.

(c) 4 B. &amp; Ad. 30.

(d) 2 H. &amp; N. 840, 848.

(e) 11 Q. B. 347.

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the injury he suffered ; he is therefore not entitled to recover : *Butterfield v. Forrester* (a), *Marriot v. Stanley* (b). It would hardly be contended that the owner of a barge on the Thames, overloaded, and in that state swamped by the waves caused by a steamer proceeding up the river at an ordinary pace, would have any remedy against the owners of the steamer. [*Martin*, B.—It would require a strong authority to convince me that because a railway runs along my land I am bound to keep it in a particular state.]

*Cur. adv. vult.*

The judgment of the Court was now delivered by

BRAMWELL, B.—In this case the material facts are : that the defendants' line passed in a cutting by the side of the plaintiff's wood : that on the side of the cutting was tall dry grass, of very combustible character, extending to the plaintiff's wood : that the defendants used a locomotive, and did, in consequence of the use of it, burn down the plaintiff's wood, but whether by first setting fire to the grass on their own land, or by throwing lighted matter on the plaintiff's land, was not determined by the jury, though there is great probability that the former was the way in which the mischief was done. It was sworn on the part of the defendants, and for the present purpose must be taken to be true, that everything that was practicable had been done to the locomotive to make it safe ; that a cap had been put to its chimney, that its ash-pan had been secured, that it travelled at the slowest pace consistent with practical utility, and that if its funnel was more guarded, or its ash-pan, or if its pace was slower, it could not be advantageously used. But it was admitted that, with these precautions, the locomotive was the cause of setting fire to the

(a) 11 East, 60.

(b) 1 Man. & G. 568.

defendants' banks, not daily but occasionally ; so that in fact it stood confessed that the locomotive was productive of mischief, that its use was dangerous, and that what had happened on this particular occasion—that is, its setting fire to the defendants' grass—was not a particular accident, but one of the habitual incidents to the use of the locomotive. Upon this the Judge offered to direct the jury to find for the plaintiff, but Mr. *Grove* preferred the question should be left to them. It was left to them to say if the defendants were guilty of negligence; the learned Judge observing, among other things, that if they had kept their banks shorn, or had had a strip of incombustible matter between their land and the plaintiff's, as, for instance, a line of gravel or stone, the mischief in all probability would not have happened, and it may be taken that the case was put to the jury in the strongest way in favour of the plaintiff. Still the question was left to them, and, unless a verdict ought to have been directed for the defendants, there is no misdirection.

The first question then is: Was there evidence for the jury? And, as they may have found on either count, was there evidence in support of each? Next: Was the evidence such as to warrant the strong opinion of the learned Judge?

We are of opinion, on both these questions, in favour of the plaintiff. Here is confessedly the use of an instrument likely to produce damage, and producing it. This, according to general rules, would make the defendants liable. But two answers were suggested on their behalf. The first was, that if the fire originated on their own land they were protected by the 14 Geo. 3, c. 78, s. 84. But we are of opinion that the statute does not apply where the fire originates in the use of a dangerous instrument, knowingly used by the owner of the land in which the fire breaks out.

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It is impossible to suppose that the engine driver is liable to eighteen months imprisonment under section 84, and equally impossible to suppose there is no remedy against either master or servant, for what is a wrong by one or both. We are of opinion therefore that this answer fails.

The next answer was, that the Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), s. 86, afforded a defence to this action. Whether it would if there was no negligence other than the use of a dangerous instrument it is not necessary to say. But here there was abundance of such evidence, if the fire broke out in the defendants' lands, for the reasons before given. So indeed there was, if it broke out in the plaintiff's land; but anyhow it cannot be contended that the statute gives the railway company a right to throw lighted coals on the adjoining land. That would be a trespass.

It remains to notice another point made by the defendants. It was said that the plaintiff's land was covered with very combustible vegetation, and that he contributed to his own loss, and Mr. *Lloyd* very ingeniously likened the case to that of an overloaded barge swamped by a steamer. We are of opinion this objection fails. The plaintiff used his land in a natural and proper way for the purposes for which it was fit. The defendants come to it, he being passive, and do it a mischief. In the case of the overloaded barge the owner uses it in an unnatural and improper way, and goes in search of the danger, having no right to impede another natural and proper way of using a public highway. We therefore think the direction was right, the verdict satisfactory, and the rule must be discharged.

The learned Judge added that he abided by the opinion he expressed at the trial.

Rule discharged.

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## SEMPLE v. KEEN.

Nov. 10.

THE plaintiff having recovered judgment against the defendant for 1599*l.*, a writ of *ca. sa.* was issued and placed in the hands of Slowman, a sheriff's officer, for execution. On the defendant paying down 200*l.* and agreeing to satisfy the residue of the debt by instalments, the plaintiff handed the following letter to the sheriff's officer:—

"May 10, 1858.

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"Dear Sir,—Please do not execute the writ of *ca. sa.* herein till further notice. Yours truly,

"H. SEMPLE.

"To Mr. Slowman and the sheriffs of Middlesex."

On the 24th of June the defendant was arrested at the suit of one Pritchard, when the sheriff's officer refused to discharge him except on payment of the balance of the debt of 1599*l.*, saying that the notice of the plaintiff was merely a direction not to take the defendant if he saw him. As soon as the plaintiff heard of the detention of the defendant, he directed the officer to let him go. It was sworn that a notice to the sheriff's officer not to execute a writ till further orders is a practice between attorneys and officers of the sheriff, whereby, if a defendant be taken at the suit of any one else, he cannot be discharged without the officer being bound to give notice to the attorney so directing a suspension, in order that he may make fresh terms, take fresh securities, or else withhold his assent to the discharge.

Plaintiff having a judgment against the defendant lodged a writ of *ca. sa.* with the sheriff, and afterwards, by letter, gave directions "not to execute the writ till further notice." The defendant being arrested on another writ, the officer detained him on the plaintiff's writ till he had communicated with the plaintiff, and then, on the plaintiff's instructions, let the defendant go:—*Held*, that, the defendant not having been legally in custody under the plaintiff's writ, the debt was not satisfied by the detention and subsequent discharge of the defendant.

*J. Brown* now moved for a rule to shew cause why

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satisfaction should not be entered on the judgment roll, the debt being satisfied by the arrest of the defendant on the ca. sa. and his subsequent discharge.—Though a direction not to execute a writ is a countermand of it, a direction not to execute it till further orders has not that effect. The defendant having been in custody under the writ, and having been discharged, the debt is gone. In *The National Assurance Association v. Best (a)* the countermand was absolute.

POLLOCK, C. B.—There will be no rule. The plaintiff may not be without means of redress for the arrest.

BRAMWELL, B.—It is clear there was no lawful arrest under the plaintiff's writ. If a defendant is arrested after explicit notice to the sheriff not to execute the writ, I think that an action lies against the sheriff. The practice in the sheriff's office does not alter the law, and it is consistent with the case of the plaintiff. The plaintiff, supposing that he would get notice if the defendant should be arrested at the suit of another creditor, keeps his writ in the office and tells the sheriff not to execute it. To tell the sheriff not to execute the writ, is to tell him not to execute it till further orders.

WATSON B.—I am of the same opinion. If a man is in custody on one writ he is in custody on all the writs in the office of the sheriff to be executed. The writ here was lying in the sheriff's office as an useless piece of paper till further orders; yet the defendant contends that he was in custody under it. If dissatisfied with our judgment, he has a remedy by *auditâ querelâ*.

CHANNELL, B., concurred.

Rule refused.

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METCALF and Others v. HETHERINGTON.

Nov. 24.

**QUAIN** had obtained a rule nisi to set aside the judgment signed in this case by the defendant.

The declaration was delivered on the 9th of November, 1854. The defendant pleaded on the 27th of the same month. In Hilary Term 1855, the plaintiffs replied to the several pleas and demurred to the 2nd plea. Judgment on the demurrer was given on the 11th of June, 1855; but no judgment with respect to the demurrer was signed. In Trinity Term, 1856, the defendant gave twenty days notice to the plaintiffs to proceed to the trial of the issues in fact. Subsequently the plaintiffs applied to a Judge at chambers to enlarge the time for proceeding to trial, but no order was made. No proceedings were taken from the 11th of July, 1856, when the summons was heard, till the 31st of May, 1858, when the defendant signed judgment, the entry of which stands in the books of the Court as follows:—

“31st May, 1858.

“*Cumberland*, for defendant.

“Plaintiffs not proceeding to trial.

“Thomas Metcalf, George Metcalf &c., *against* Robert Hetherington. “Costs £ .”

A summons having been taken out to set aside the judgment on the ground that it had been signed prematurely, no proceedings having been taken in the action for more than twelve months and no notice of intention to proceed having been given in pursuance of Reg. Gen. Hil. T. 1853, r. 176, *Channell*, B., referred the parties to the Court.

*Mikhoard* now shewed cause.—Formerly it was not neces-

Rule 176, Hil. T. 1853, requiring a month's notice of intention to proceed where there have been no proceedings for one year, applies to the signing of judgment for not proceeding to trial under the 101st section of the Common Law Procedure Act, 1852.

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sary to give a month's notice to proceed before obtaining a rule for judgment as in case of nonsuit. The twenty days notice to proceed is substituted for that rule. So where a party was entitled to judgment, as after verdict, or upon a Judge's order, and nothing remained to be done except the signing of judgment, a month's notice was not necessary: 1 Archbold's Practice, by Chitty and Prentice, 145. The 176th Rule of Hil. T. 1853, does not apply.

*Quain*, in support of the rule.—The twenty days notice to proceed to trial having been given in Trinity Term, 1856, which was the last proceeding, and upon which the defendant would have been entitled to sign judgment in November, 1856, the defendant could not sign judgment in May, 1858, without giving a month's notice. There is no analogy to the case of a judgment after verdict, when nothing remains but signing the judgment. The case resembles rather that of a writ of inquiry. By the Common Law Procedure Act, 1852, s. 101, the defendant is empowered "to suggest on the record that the plaintiff has failed to proceed to trial although duly required to do so," and upon that judgment may be signed. The rule for judgment as in case of nonsuit was a rule nisi, and terms might have been imposed: it was therefore not analogous to this, which is an *ex parte* proceeding. [*Channell*, B.—The suggestion is a step in the cause. It is not to be "traversable, but only to be subject to be set aside if untrue." It is clear, therefore, that the plaintiff ought to have an opportunity of contesting it. *Martin*, B.—Surely the case is directly within the terms of the rule.]

*POLLOCK*, C. B.—The rule must be absolute to set aside the judgment; the costs of the proceeding before my brother *Channell* at chambers and of this rule to be costs in the cause.

Rule accordingly.

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## FUTCHER v. HINDER.

Nov. 20.

**T**RESPASS for assaulting and imprisoning the plaintiff in a common gaol.

Pleas.—First: Not guilty.

Secondly.—That before the time when, &c., R. Burleigh, W. Snelgar and G. Burleigh sued and prosecuted out of the Court of Exchequer a writ of ca. sa. against the plaintiff, directed to the sheriff of Wilts, by which writ our Lady the Queen commanded the said sheriff that he should omit not, &c., but take the plaintiff, &c., to satisfy the said R. Burleigh, W. Snelgar and G. Burleigh 74*l.* 1*s.* 4*d.* which they had lately in the said Court recovered against the plaintiff, &c.: which said writ was afterwards and before the return thereof, and before the said time when, &c., delivered to and was in the hands of the said sheriff to be executed in due form of law. Whereupon the said sheriff afterwards and before the return thereof, and before the said time when, &c., for having execution thereof, made his warrant in writing sealed with the seal of his office, &c., and then directed the same to the keeper of the gaol of the said county, and also to one other Samuel Hinder and the defendant and Job Doe (the defendant then and until and at and after the said time when, &c., being a bailiff of the said sheriff), and by the said warrant commanded them and every of them jointly and severally that they or one of them should take the plaintiff, if he should be found within the said sheriff's bailiwick, &c. (setting out the warrant

In February 1857, the defendant, a sheriff's officer, received from the under-sheriff a warrant to execute a writ of ca. sa. issued on a judgment recovered against A. the now plaintiff, by B. On the 20th April, B.'s attorney wrote to the defendant to suspend the execution for fourteen days. On the 2nd May, B.'s attorney wrote to the defendant as follows:—"This action having been arranged, we have given, Mr. G." (A.'s attorney), "who informs us he has paid your charges, notice of withdrawal of ca. sa." On the same day B.'s attorney wrote to A.'s attorney acknowledging the receipt of money in settlement of

the action. No notice of the withdrawal of the ca. sa. was sent to the sheriff or under-sheriff. On the 7th November, the under-sheriff wrote to the defendant to execute the ca. sa., and he accordingly arrested and imprisoned A. under that writ. In an action of trespass by A. against the defendant.—*Held*, first, that the notice to the defendant by the letter of the 2nd of May was notice to the sheriff. Secondly, that the letter was in terms a sufficient notice that the action was settled and the ca. sa. withdrawn.

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which was in the same terms as the writ). The plea then stated (in the usual form) the delivery of the warrant to the defendant, as and then being such bailiff as aforesaid, to be executed, and that by virtue of the warrant he arrested the plaintiff and imprisoned him in the common gaol: which were the trespasses complained of.

Replication.—That, after the delivery of the writ of *ca. sa.* to the sheriff, and after the delivery of the warrant to the defendant, and before any execution thereof, the plaintiff paid and satisfied the judgment debt in the writ and warrant mentioned, and satisfied and discharged the claims of the said R. Burleigh, W. Snelgar and G. Burleigh thereunder and in respect of which the writ was issued: whereupon the said R. Burleigh, W. Snelgar and G. Burleigh, before the execution of the said writ or warrant, and before the committing of the trespasses, &c., gave notice to the said sheriff and to the defendant, as and being such officer of the said sheriff as in that plea mentioned, of the said payment, satisfaction and discharge; and then instructed, authorised and required the said sheriff and the defendant, as and being such officer, not to execute the said writ or warrant, and not to levy against the body of the plaintiff upon or in respect of the said judgment or otherwise howsoever, and then forbad the said sheriff and the defendant respectively to execute the said writ or warrant: wherefore the defendant, of his own wrong, &c., committed the trespasses, &c.

The defendant joined issue on the replication.

At the trial before *Channell, B.*, at the last Bristol Assizes, it appeared that the action was brought against the defendant, who was a bailiff of the sheriff of Wilts, for arresting the plaintiff under the following circumstances:—In the year 1856 two judgments were recovered against the plaintiff, one at the suit of Burleigh and others, and another at the suit of one Beck. On the 17th February, 1857, the

defendant received from the then under-sheriffs of Wilts warrants on writs of ca. sa. issued on the above mentioned judgments. The defendant tried to execute the warrants, but could not find the plaintiff. On the 21st April, 1857, the defendant received the following letter from Messrs. Cox, the attorneys in the action against the plaintiff at the suit of Burleigh and others :—

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“London, April 20, 1857.

“Burleigh and Others v. Fletcher.

“Sir,—You will be pleased to suspend the execution of the ca. sa. herein for fourteen days from this day.

“Mr. Saml. Hinder, Junr.

“Yours &c.,

“Sheriff’s Office, Salisbury.”

“Cox & Sons.”

The defendant accordingly delayed to execute the warrant. On the 2nd May, 1857, Messrs. Cox sent by post the following letter addressed to the defendant :—

“May 2, 1857.

“Burleigh and Another v. Fletcher.

“Sir,—This action having been arranged we have given Mr. Genge (who informs us he has paid your charges) notice of withdrawal of ca. sa.

“Mr. S. Hinder, Sheriff’s Officer,

“Yours, &c.

“Salisbury.”

“Cox & Sons.”

It was proved that this letter was posted on the 2nd May, but there was conflicting evidence as to its having reached the defendant. Messrs. Cox also wrote on the same day to Mr. Genge, the managing clerk of the now plaintiff’s attorney, acknowledging the receipt of money and the defendant’s note in settlement of the action at the suit of Burleigh and others, and inclosing a withdrawal of the ca. sa. No notice of the withdrawal of the ca. sa. was given to the sheriff or under-sheriff. On the 31st October, 1857, the defendant received a letter from the under-sheriff, stating



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that in the case of *Beck v. Futch* the plaintiff's attornies wished the warrant to be executed. This letter concluded thus:—"There is also a warrant against the same defendant, held by you in *Burleigh v. Futch*." On the 7th November, 1857, the defendant received by post a letter from the under-sheriff stating that the plaintiff's attornies had again desired that the execution of the *ca. sa.* in the action of "*Beck v. Futch*" might be suspended; and that the defendant must execute the one in "*Burleigh and Others v. Futch*," if possible. On the 14th November, the defendant arrested the plaintiff on this warrant and conveyed him to Salisbury gaol, where he remained until the 18th, when he was discharged by direction of the sheriff. There was evidence that it was usual in Wilts to send notice of countermand to the under-sheriff or the London agent.

It was objected on behalf of the defendant, first, that there was no notice to the sheriff or under-sheriff that the judgment was satisfied; secondly, assuming that notice to the defendant was a notice to the sheriff, the letter of the 2nd May was not under the circumstances a sufficient authority to the defendant not to execute the warrant. The learned Judge reserved to the defendant leave to move to enter the verdict for him on these points; and his lordship left it to the jury to say whether there was notice in fact to the defendant not to execute the warrant. The jury found a verdict for the plaintiff with 50*l.* damages.

*Montague Smith*, in the present term, obtained a rule nisi to enter the verdict for the defendant pursuant to the leave reserved, or for a new trial, on the ground that the verdict was against the evidence and the damages excessive.

*Slac'e and Prideaux* now shewed cause (*a*).—The point

(*a*) Before *Bramwell*, B., *Watson*, B., and *Channell*, B.

of law involves two questions: first, whether notice to the officer who holds the warrant not to execute a writ of ca. sa. is notice to the sheriff; secondly, assuming that it is, whether this notice is in terms sufficient. There is no authority directly in point. By the 126th section of the Common Law Procedure Act, 1852, "a written order under the hand of the attorney in the cause, by whom any writ of ca. sa. shall have been issued, shall justify the sheriff, gaoler, or person in whose custody the party may be under such writ, in discharging such party, unless the party for whom such attorney professes to act shall have given written notice to the contrary to the sheriff, gaoler, or person in whose custody the opposite party may be," &c. It is true that the object of that enactment was to give validity to a discharge by the attorney after the termination of the suit; but it recognises the practice to give notice, not only to the sheriff, but to the person in whose custody the party may be. Here the attorney, whose name was on the back of the writ, gave a written notice to the officer holding the warrant that the action had been settled, and that he had given the defendant's attorney notice of the withdrawal of the ca. sa. That would have justified the officer in discharging the plaintiff; and if he had done so the sheriff would not have been liable for an escape. Then, how can it be said that the warrant was in force and capable of being executed? But, supposing it was necessary to give notice to the sheriff, notice to the officer was notice to the sheriff. The officer stands in the same relation to the undersheriff as the latter does to the sheriff: notice to the undersheriff is notice to the sheriff, and notice to the officer is notice to the undersheriff. In *Howard v. Cauty* (a) notice was given by the plaintiff's attorney to the officer who held the warrant not

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(a) 2 D. & L. 115.

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to execute the writ of ca. sa., and it was argued that the officer was merely an agent to arrest, not an agent to receive notice; but *Wightman, J.*, seems to have been of opinion that in such a case notice to the officer was notice to the sheriff. If the action had been against the sheriff, it might have been a question whether this letter sent to the officer was notice to the sheriff, but here the action is against the officer in respect of a tort committed by him. When the undersheriff wrote to him to execute the writ, he neglected to reply that it had been withdrawn. If the letter had been sent to the undersheriff, and he had neglected to act upon it, the sheriff would have been liable. Whenever the execution of a writ is entrusted to a particular officer, he becomes the agent of the sheriff to receive all notices relating to that writ. [*Bramwell, B.*—The writ is not in the hands of the officer, and there may be several warrants to different officers. Suppose two warrants are issued, and one is delivered to bailiff A., and the other to bailiff B.: afterwards notice is given to A. not to execute the writ, and then B. executes it.] In that case the sheriff would be entitled to a reasonable time for notice to be given to the other bailiff.—Then, with respect to the terms of the letter, it conveys a sufficient intimation that the action was settled and the writ was not to be executed. Its language is similar to that of the letter in *Howard v. Cauty*.—They also argued that the verdict was not against evidence, and that the damages were not excessive.

*Montague Smith* and *H. T. Cole*, in support of the rule.—There was no evidence of the withdrawal of the writ. No notice was sent either to the sheriff's office in London or in the country. The undersheriff is not a mere agent of the sheriff, but the person who has the control and direction of writs lodged at his office. The bailiff is only

his servant. *Howard v. Cauty* was not an action against the officer, and the decision of *Wightman, J.*, proceeded on the particular circumstances of that case; viz. that the notice of countermand was given to the officer who was in the first instance selected by the plaintiff's attorneys to execute the writ. There is no authority for the proposition that notice to the officer is notice to the sheriff: it cannot be *eo instante*, for there must be time to transmit it to the undersheriff. [*Bramwell, B.*, referred to *Christopherson v. Burton (a)* and *The National Assurance and Investment Association v. Best (b)*.] The 126th section of the Common Law Procedure Act, 1852, has no application: its effect is to give to the attorney in the action an authority which he did not before possess, not to make the officer the agent of the sheriff. A bailiff is not the agent of the sheriff so as to bind him by the bailiff's receipt of the debt or costs on the execution of a ca. sa.: *Woods v. Finnis (c)*.—Then, as to the letter itself: it does not contain a positive statement that the action had been settled, so as to justify the officer in not executing the writ; it only conveys an intimation that some arrangement had taken place, and would lead the officer to suppose that he would receive notice from the undersheriff not to execute the writ. But, the undersheriff having desired him to execute it, he would naturally think that the arrangement had not been carried out.—They also argued that the verdict was against the evidence, and that the damages were excessive.

BRAMWELL, B.—The damages are certainly excessive, and the rule must be absolute for a new trial unless the plaintiff consents to reduce the damages. With respect to the question of notice, I have felt some doubt. I incline

(a) 3 Exch. 160.

(b) 2 H. &amp; N. 605.

(c) 7 Exch. 363.

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to the opinion that unless the sheriff is liable to an action, his officer is not. It seems to me impossible to contend that a master is not liable for an act done by his authority, yet the servant or inferior is. Therefore I think that if an action could not be maintained against the sheriff, it cannot be against his officer. Then, would an action be maintainable against the sheriff? I should be reluctant to lay down that in all cases notice to the officer is notice to the sheriff; but certain notices may be properly given to the bailiff. A sheriff is obliged to entrust the execution of writs to a bailiff: he is the proper officer to execute a *ca. sa.*; and it seems to me that in such case a communication to the officer is a communication to the sheriff: *The National Assurance Association v. Best* is an authority that a direction to the officer entrusted with the warrant, is sufficient notice to the sheriff not to execute the writ. Therefore if this letter gives such notice, the sheriff would be liable to an action, and consequently the officer is liable.

Then, as to the terms of the letter: again I had considerable doubt. The words are:—"This action having been arranged we have given Mr. Genge notice of withdrawal of *ca. sa.*" If the proper meaning of the letter is that notice of the withdrawal would be sent to the sheriff, or that Genge would communicate it to the sheriff, it seems to me that the letter would not be a sufficient notice. I think, however, that such is not its proper meaning, but its meaning is this:—"The action is arranged, do not execute the writ; we have given Genge notice of its withdrawal." That being so, it was easy for the officer to have communicated it to the sheriff. Therefore, though not without doubt, I have come to the conclusion that this is a sufficient notice.

WATSON, B.—I am of the same opinion. I agree that

the damages are excessive. Then, as to the point of law:—Not in every case, but in some, the officer is the proper person to receive notice of the withdrawal of the writ. The sheriff does not execute the writ, and the undersheriff, who is his agent for all purposes, has no control over the writ: when the warrant is directed to the officer, he is the sole person charged with its execution. Although in this case the warrant was directed to other persons besides the defendant, there was but one warrant, and the defendant held it. When it is required to prevent an officer from executing a writ of *fi. fa.*, he is the sole person to whom notice is given not to execute it. Suppose a writ is delivered to an officer to be executed on the borders of Cumberland; if it is required to stay the execution, how is that done except by sending notice to the officer.

The next question is, what is the effect of the letter? Is it or is it not a notice to withdraw? It begins:—"This action having been arranged." What can any person understand by that, except that the action is at an end? If it had said "the action is settled," it would have conveyed the same meaning. Then it goes on to say:—"We have given Mr. Genge notice of withdrawal of *ca. sa.*" It does not say that Genge is to send the notice of withdrawal. The officer can only act upon a withdrawal sent by the plaintiff's attorney: the defendant's attorney is not bound to interfere. It seems to me that the true interpretation of the letter is:—"The action is settled; stay your hands." I therefore think that the sheriff had notice and that upon this point the rule ought to be discharged.

CHANNELL, B.—I agree that the rule must be absolute only on the ground of excessive damages. The other point raises two important questions: first, whether notice to the officer is notice to the sheriff: secondly, assuming

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that it is, whether this letter was a sufficient notice. I cannot say that the matter is altogether free from doubt; but under the circumstances I think that the letter was a sufficient notice. On the 20th April there was a notice to suspend the execution for fourteen days, and on the 2nd of May the plaintiff's attorney wrote to the officer that the action had been arranged. Then, taking this to be a good notice, the question is whether the sheriff was bound to act upon it. Without laying down a rule under all circumstances, I think that in this case the notice to the officer was notice to the sheriff.

Rule absolute for a new trial,  
 unless the plaintiff consents  
 to reduce the damages.

Nos. 2.

ELLIS v. HOPPER.

One of the conditions of a race was that "all disputes should be settled by the stewards, whose decision should be final." There were four stewards, and a dispute having arisen as to whether the plaintiff's horse or the defendant's mare was the winner, three of the stewards voted in favour of the plaintiff's horse. One of the three had betted against the defendant's mare.—*Held*, that the steward was not disqualified from acting by reason of his pecuniary interest in the event of the race; and even assuming that he was, that did not annul the decision of the other stewards.

THIS was a feigned issue to try whether the plaintiff was entitled to certain stakes called the "Farmers and Tradesmen's Stakes," for which a race was run at the Howden Spring Meeting, 1858.

At the trial, before *Pollock*, C. B., at the last Yorkshire Summer Assizes, it appeared that seven horses started for the race, which was a steeple chase, and amongst them the plaintiff's horse, called "Chieftain," the defendant's mare, called "Milkmaid," and a mare belonging to a third person, called "Filly by Vortex." The defendant's mare came in first, the plaintiff's horse second, and "Filly by Vortex" third. The plaintiff claimed the stakes on the ground that

One of the three had betted against the defendant's mare.—*Held*, that the steward was not disqualified from acting by reason of his pecuniary interest in the event of the race; and even assuming that he was, that did not annul the decision of the other stewards.

the defendant's mare had crossed the path of "Filly by Vortex," and so prevented his horse winning. There was a printed programme of the race, which contained the following condition—"All disputes to be settled by the stewards, whose decision shall be final." There were four stewards, three of whom voted in favour of the plaintiff, and one for the defendant. One of the stewards, named Allenby, who had voted for the plaintiff's horse, had a pecuniary interest in the event of the race, since he had betted with one Walker against the defendant's mare.

It was objected, on behalf of the defendant, that the decision of the stewards was not binding, inasmuch as Allenby was an interested party and decided in his own favour. The learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him.

*Atherton* now moved accordingly.—As a general rule, if a judge has a direct pecuniary interest in the event of a suit, he is incapable of acting, and the matter is coram non judice. In the case of persons constituted judges without the option of the parties, the rule is clear; as, for instance, the Judges of the superior Courts of law and equity: *Dimes v. The Proprietors of the Grand Junction Canal* (a). The same rule applies to judges of inferior Courts, as justices of Quarter Sessions: *Regina v. The Justices of Suffolk* (b). The rule also prevails in the case of judges chosen by the parties. In Russell on Arbitration, p. 108, 2nd ed., it is said:—"The arbitrator ought to be a person who stands indifferent between the parties. If he has any secret interest in the subject in question, or has any bad feeling towards either disputant, he is not a proper person to be a judge between them." Here the stewards were in the position of arbitrators. [*Watson, B.*—Is there any implied

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(a) 3 H. L. Cas. 759.

(b) 18 Q. B. 416.



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condition that if one of the stewards has made a bet the whole tribunal shall be disqualified from acting?] The objection resulting from interest is the same as in the case of legally constituted judges. [*Pollock*, C. B.—If the vote of this steward is annulled, there is still a majority of two to one in the plaintiff's favour.] By the condition contained in the programme of the race the four stewards ought to act.

POLLOCK, C. B.—We are all of opinion that there ought to be no rule. It appeared to me at the trial that the case was not within the principle of the decision in *Dimes v. The Proprietors of the Grand Junction Canal*, and I think so still. This is not like the case of a judge or an arbitrator; it is a reference according to certain rules, one of which was that the stewards should decide all disputes; the object being to prevent the necessity of resorting to litigation or arbitration. With this view, the rule provides that disputed questions shall be referred to the stewards, who would be on the spot to see for themselves and hear evidence, and their decision is to be final. Whether on the ground that there is no disqualification by reason of betting, or upon the ground that, excluding this steward, there is still a majority of two to one in favour of the plaintiff, I think that the verdict was properly entered for him.

BRAMWELL, B.—I am of the same opinion. The question put by my brother *Watson* in the course of the argument seems to me decisive; viz. is there any implied condition that the appointed arbitrators or judges shall be without power if one of them becomes interested in the event of the race? If none exists, then is there any general proposition of law that, whenever a dispute is referred to one or several persons, his or their power shall cease if any

of them becomes interested in the event? I know of no such rule. When parties agree to refer a matter, they may if they please insert a condition to that effect; but if they do not, why should we make such a condition for them? As to whether, if one steward was disqualified, the other three might act, I give no opinion: my judgment proceeds on the ground that there was no implied condition that the being interested should take away the power to act.

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Rule refused.

LADY EMILY FOLEY v. FLETCHER and ROSE.

Nov. 17.

**T**HE declaration stated that by indenture between Sir F. Scott of the first part, the plaintiff of the second part, the defendants of the third part, and W. Matthews and W. Hatton of the fourth part; reciting that Sir F. Scott was seised in fee of one moiety and the plaintiff of the other moiety of certain buildings, lands and mines therein described, &c.; and reciting that the defendants were partners

F, being seised in fee of one moiety of certain mines, sold her share for 45,000*l.*, payable 3,385*l.* down and the residue by half-yearly instalments of 768*l.* 11*s.* 8*d.* during a period

of thirty years:—*Held*, first, that the purchaser was not empowered, by 16 & 17 Vict. c. 34, s. 40, to deduct income tax from the instalments.

Secondly: that the instalments were not chargeable with income tax under the words "annuities or other annual profits and gains" in Schedule (D.) of the 16 & 17 Vict. c. 34; or under the words "annual payments, payable as a personal debt or obligation, by virtue of any contract," in the 5 & 6 Vict. c. 35, s. 102, such instalments being the payment of a debt, and not being profits and gains, and therefore not within the purview of the Acts.

A declaration stated, that the defendants by indenture covenanted with plaintiff to pay her certain monies by the several instalments and at the several times, and *subject to the provisions* and agreements, and in manner thereafter expressed; viz. the sum of 768*l.* on every 24th day of December in each year, until, &c.; and in case either of the instalments of 768*l.* should not be paid upon the day appointed for payment, or within one calendar month next after the same day, then the defendants should upon demand pay to the plaintiff interest upon the instalment, to be computed from the 24th of December. Breach: that though the 24th of December had elapsed the defendant had not paid an instalment. Plea.—That by the indenture it was provided, that no instalment, payable under the covenants therein contained, should be recoverable or capable of being enforced, nor should any proceeding for that purpose be commenced, till after the expiration of one calendar month from the day when the same should become payable under the covenant; nor should any interest become payable in respect thereof till the expiration of such calendar month from such day, and that one calendar month from the day on which the instalment became payable had not expired before suit:—*Held*, that the covenant was qualified by the proviso, and that the plea was good.

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in the business of coal and iron masters, and in the said buildings, lands and mines; and that Sir F. Scott and the plaintiff had agreed with the defendants for the sale to them of the buildings, lands, mines, colliery, engines, and plant for 99,000*l.*; and that the buildings, lands, mines, &c., should be conveyed to Matthews and Hatton upon the trusts therein declared: It was witnessed, that in consideration of 6,770*l.*, before the execution of the indenture paid by the defendant to Sir F. Scott and the plaintiff in moieties, and of 92,230*l.* residue of the sum of 99,000*l.*, to be paid by the several instalments therein mentioned, Sir F. Scott and the plaintiff did grant, release and convey, and the defendants confirmed, to Matthews and Hatton, the buildings, lands, mines, &c., to the use of Matthews and Hatton for ever, upon certain trusts, &c.; and the defendants did by the said indenture covenant to pay to Sir F. Scott 46,115*l.*, being one equal half part, &c.; and did also covenant with the plaintiff, that the defendants would pay, or cause to be paid, to the plaintiff 46,115*l.*, being the other equal moiety or half part of the said sum of 92,230*l.*, by the several instalments and proportions, and at the several times, and subject to the provisoes and agreements, and otherwise in the manner thereafter expressed, viz.: the sum of 768*l.* 11*s.* 8*d.* on every 24th day of June and 24th day of December in every year after the year of our Lord 1854, until and inclusive of the 24th day of December, 1884; the first instalment to commence on the 24th of June, 1855, and subject nevertheless to such eventual acceleration or variation of the time or times of payment as therein mentioned. And in case either of the instalments or sums of 768*l.* 11*s.* 8*d.* should not be fully paid by the defendants upon the day appointed for payment thereof, or within one calendar month next after the same day, and should not have been previously satisfied,

pursuant to any of the provisions of the indenture, then the defendants should upon demand, or in default of demand, pay to the plaintiff interest at the rate of 4l. per cent. upon the instalment, or upon each such instalment which for the time being should be in arrear and unpaid; and such interest should be computed from the 24th of June or 24th of December, as the case may be, upon which the instalment should have become payable, or, as the case might require, should be computed from the then last preceding day for payment of interest upon the instalments so in arrear; and that every payment thereinbefore covenanted to be made should be so made without any deduction, except in respect of any property or income tax which ought in law to be so deducted from such interest.—Averment: that the acceleration or variation of the time of payment depended upon events which had not happened. Breaches:—First, that the 24th of June and the 24th of December in the years of our Lord 1855, 1856 and 1857, had elapsed, but the defendants had not paid the six instalments due. Secondly, that though the instalments were not paid on the appointed days respectively or within one calendar month after those days respectively, the defendants had not paid interest, &c.

Second plea.—As to the instalment due on the 24th of December, 1857, that by the said indenture it was provided and agreed that no instalment or other principal sum for the time being payable under or pursuant to the covenants and provisions therein contained, should be recoverable or capable of being enforced, nor should any proceeding for that purpose be commenced until after the expiration of one calendar month from the day upon which the same instalment or sum should have become payable, under or pursuant to the covenants and provisions therein contained; nor should any interest accrue or become payable in respect

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thereof until the expiration of such calendar month: and that one calendar month from the day upon which the last mentioned instalment or sum became payable, under or pursuant to the covenants and provisions contained in the said indenture, had not expired before this suit.

Fourth plea.—As to 236*l.* 7*s.* 8*d.*, parcel of the instalments, that in making payment of the said instalments respectively, the defendants deducted and retained out of the said instalments respectively divers sums of money, amounting in the whole to the sum of 236*l.* 7*s.* 8*d.*, being the amount of the rate of duty which at the times when the said instalments respectively became payable, was payable under the statute (16 & 17 Vict. c. 34), and that by such deduction and by virtue of such statute they were acquitted and discharged of the sum of 236*l.* 7*s.* 8*d.*

The plaintiff demurred to these pleas and the defendants joined in demurrer.

*Atherton* (with whom was *Gray*), in support of the demurrers.—First, the second plea is bad because the covenant is absolute to pay the instalment on the 24th of December. The proviso in the indenture that no instalment shall be recoverable or capable of being enforced, and that no proceeding for that purpose shall be commenced till after the expiration of a month, amounts merely to a covenant not to sue for a month, and cannot therefore be pleaded in bar of the action: *Ford v. Beech* (a). The defendants must contend that the proviso is a qualification of the covenant, making the instalments due and payable not in June and December, but in July and January. Now, looking at the whole deed, the instalments are due on the days named for payment. If the plaintiff were to die between the 24th of June and the 24th of July in any

(a) 11 Q. B. 862.

year, the debt would go to her executors. In case of the defendants' bankruptcy the debt might be treated as actually due before the expiration of the month.

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Secondly, the fourth plea is bad. The argument for the defendants must amount to this: First, that where the purchase money of an estate is payable by instalments, the instalments are subject to income tax; a charge which the gross sum would have escaped. Secondly, that the income tax must be paid in the first instance by the purchaser. Now the 16 & 17 Vict. c. 34, sect. 5, enacts that the duties thereby granted shall be assessed, raised, levied and collected under the provisions of the 5 & 6 Vict. c. 35, which is revived for that purpose. The 40th section of the later Act enacts, that every person who shall be liable to the payment of any "annuity or other annual payment, either as a charge on any property, or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled &c., on making such payment, to deduct and retain thereout the amount of the rate of duty which, at the time when such payment becomes due, shall be payable under this Act, &c., and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; and the person to whom such payment as aforesaid is to be made shall allow such deduction upon the receipt of the residue of such money," &c. In order to shew a right to deduct, the defendants must first shew that they are chargeable in respect of these instalments. [*Watson, B.*—The 40th section is a regulating and not a charging section: it imposes no new duty.] The defendants must shew that, under Schedule (D.) in sect. 2 of the 16 & 17

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Vict. c. 34, the instalments are liable to income tax. They must allege that the instalments are "annuities or other annual profits or gains." But they are not so. The 102nd section of the 5 & 6 Vict. c. 35 is the provision under which, if at all, this duty would be levied on the defendants. That is, in terms, a charging section: it empowers the parties paying any annuities or annual payments "out of profits or gains" chargeable by virtue of that Act, or "out of any annual payment liable to deduction, or from which a deduction hath been made," to deduct out of such annual payments 7*d.* in the pound. Schedule (D.) in sect. 2 of the 16 & 17 Vict. c. 34 contains a clause, in addition to those in Schedule (D.) sect. 1 of the earlier Act, as follows:—"And for and in respect of all interest of money, annuities and other annual profits and gains not charged by virtue of any of the other Schedules contained in this Act." This clause is in effect substituted for sect. 102 of the 5 & 6 Vict. c. 35, and it relates solely to such annual payments as are annual profits or gains. [*Channell, B.*—*Taylor v. Evans* (a) was argued as if the question depended wholly on sect. 102.] If the question depends upon that section the defendants cannot deduct the income tax, because the payment is not made out of profits or gains. Whether they work the mines or not they must pay the instalments. [*Bramwell, B.*—Suppose a person covenants to pay an annuity: can he deduct income tax?] The annuity is liable to income tax, but whether the person paying or person receiving it must be assessed would appear, from sect. 102, to depend upon whether it is made payable out of profits and gains, or not.

*Phipson*, for the defendants.—As to the first point. It is not disputed that a covenant not to sue for a limited time

(a) 1 H. & N. 101.

for a debt actually due and payable cannot be pleaded in bar: *Aloff v. Scrimshaw* (a), *Thimbleby v. Barron* (b). In the present instance, however, the proviso is incorporated in the covenant and qualifies it. Therefore the effect is, not that the creditor agrees not to sue, but that the debt is made not enforceable till the expiration of a month. The case is similar to that of *Trott v. Smith* (c). The month's time which the defendants have for payment resembles the days of grace on a bill of exchange, in which there is a written contract to pay on a certain day, but, by the custom of merchants, payment is not enforceable till three days after. This, therefore, is not like the case of a debt absolutely due, with a collateral covenant not to sue.

Then, as to the fourth plea. First, these instalments are chargeable with income tax. Nothing but annual profits are chargeable under the Schedules in the 5 & 6 Vict. c. 35. But sect. 102 is an independent charging section, and it imposes duty upon "annual payments," "as a personal debt or obligation by virtue of any contract." The party paying the instalments is bound to make a return of all his profits and gains, and may deduct the income tax from the payments out of them. If a person chooses to turn his capital into annual income, income tax will attach upon it. In *Taylor v. Evans* (d) there was a conveyance of mineral property for fifty years for the sum of 1380*l.*, payable by annual instalments of not less than 150*l.* It was a mere personal covenant to pay. The judgment assumes that some one was liable to income tax. [*Pollock, C. B.*—There the land was not absolutely sold.] It was a sale of the coal mine in fee, because the coal would be worked out in fifty years. In *Edmonds v. Eastwood* (e) a tenant was

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(a) 2 Salk. 573.

12 M. &amp; W. 688, 701.

(b) 3 M. &amp; W. 210.

(d) 1 H. &amp; N. 101.

(c) 10 M. &amp; W. 453. In error,

(e) 2 H. &amp; N. 811.



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held to have a right to deduct income tax on royalties in respect of earth taken for bricks. [*Pollock*, C. B.—There the payments were reserved as rent.] It would never have been necessary for the defendants to shew that they had paid income tax *on these sums specifically*. If there had been an assessment *on the whole* of the defendants' gains and profits *out of which* the annual payments are made, it would have been enough to entitle them to deduct the money. That appears from sect. 104. [*Watson*, B.—Suppose the mine was worked at a profit of 100*l.* a year: what would the defendants be entitled to deduct?] By sect. 104, they could only have deducted on proof to the satisfaction of the Commissioners that they had in fact paid the tax. The annual payments here were profits. There is nothing to shew that the defendants ever agreed to pay 45,000*l.* for the plaintiff's moiety, except upon the terms that the payment should be spread over a period of thirty years. The plaintiff therefore has converted her capital into an annual payment or annuity. By so mixing up capital with the gains and profits upon it, the capital and profits are inseparable, and the Court will therefore take judicial notice that the annual payments are gains and profits made by allowing payment to be deferred. This case does not resemble one where a certain specific debt is paid by instalments of capital. There the Court can see that the payments are not gains and profits, and therefore income tax would not attach.—Secondly, assuming the income tax to be payable; under the 104th section of 5 & 6 Vict. c. 35, the defendants would have had no right to deduct it except on proof of payment. But the 16 & 17 Vict. c. 34, s. 40, enables persons "liable to the payment" "of any annual payment," "as a personal debt or obligation by virtue of any contract," to deduct the income tax from the payments. [*Bramwell*, B.—Might not the plaintiff herself be assessed,

if any one is liable to be so?] That must be admitted. [*Bramwell*, B.—Suppose the defendants had an income of less than 100*l.* a year, and were therefore not themselves chargeable, would they be at liberty to deduct the income tax under the 40th section?] That case might present some difficulty; but the enactment in sect. 40 is positive, and applies in terms to the present case.

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*Gray* replied.

POLLOCK, C. B.—The defendants are entitled to judgment on the demurrer to the second plea, and the plaintiff on the demurrer to the fourth plea. The demurrer to the second plea raises the question, whether, where a deed contains a covenant for payment of money on a particular day, subject to a proviso that no action shall be brought till after the expiration of a month, if such action is brought before the end of the month it is not brought too soon. The covenant is mixed up with the proviso in the deed, and the case is therefore not like that of a mere naked covenant to pay, with an independent proviso in another part of the deed that no action should be brought for such a period. The covenant is to pay the instalments, “subject to the provisos therein expressed.” The proviso must be construed as extending the time for payment. The stipulation for the payment of interest makes the matter more clear. In case either of the instalments shall not be paid on the day appointed for payment, or within one calendar month after the said day, interest is to be payable, to be computed from the same day. The object is to create a motive to pay within the month; but we think that no action can be maintained until after the expiration of the month.

The question upon the fourth plea turns upon whether this is an annuity or annual payment liable to income tax

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under either the first or second Act referred to. Both of them have substantially the same title: "An Act for granting to her Majesty duties on profits arising from property, professions, trades and offices." We must read the enactments with reference to this, that the duties are to be levied on profits and not on anything else. The several Schedules of the first act are: (A.) for all lands and tenements, in respect of the property thereof; (B.) for land in respect of the occupation thereof; (C.) upon all profits arising from annuities, dividends out of any public revenue, &c.; (D.) upon all profit or gains, from any kind of property whatever, whether in Great Britain or elsewhere, or from any profession, trade or employment: (E.) upon every public office or annuity payable out of the public revenue. These were the several matters liable to be taxed; and the question is, whether on the sale of an estate which professes to be for the sum of 99,000*l.*, of which a part is paid down and a part paid by instalments, extending over a long period of years, such instalments are to be considered as an annuity or annual payment, and liable to income tax. Mr. *Phipson* contended that they were profits, because when the value of money and the effect of such a protracted period of payment are considered, we could not assume that the value of the plaintiff's moiety was more than some 23,000*l.*, and that the rest must be considered as profit, and that it was the fault of the plaintiff that she has so mixed up profits with capital that they cannot be distinguished; and that therefore the whole must be liable to income tax. But there is nothing on this record to shew that the property was not worth more than 99,000*l.*, nor is there anything to shew that the postponement of payment was not a mere indulgence on the part of the seller. But if we were at liberty to speculate on the matter, and could come to the conclusion that a part of the annual payments is the price of the convenience of

getting the payment postponed, we could not say that the payments are within the Act because a part of them consists of profit. These instalments are payments of money due as capital: the Act has made no provision for such a case. It professes to charge profits only, and we cannot say that capital is liable to the income tax because found in company with profits. If payments such as those in the present case are subject to income tax, wherever any debt of any sort is to be repaid by annual payments, or by instalments at three or six months, it would be subject to income tax. I think, therefore, that the 102nd section of the 5 & 6 Vict. c. 35, must be read thus:—"Be it enacted, that upon all annuities, yearly interest of money, or other annual payments (*ejusdem generis*), either as a charge on any property of the person paying the same, by virtue of any deed, or will, or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract"; and it must be taken expressly to exclude contracts to repay debts. If profits are mixed up with the debt they will not make the debt liable. Mr. *Phipson* adverted to the 40th section of the 16 & 17 Vict. c. 34. That section refers to "every person who shall be liable to the payment of any rent or any yearly interest of money, or any annuity or other annual payment" (that must be *ejusdem generis*); "either as a charge on any property, or as a personal debt or obligation, by virtue of any contract"—(*ejusdem generis*). If the annual payment is the repayment of principal, the return of a debt, and is not profit, it is not at all within the purview of the Act, the very title and all the provisions of which announce that it is for imposing a tax on profits. If there is the purchase of an annuity, that annuity is made chargeable in express terms. But this is not a contract to pay an annuity, but to pay a principal sum of money, and the Court can only carry into effect the language of the Act. The section

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goes on,—“Whether the same shall be received or payable half-yearly, or at any shorter or more distant periods,” the person paying shall be entitled, on making such payment, to deduct the duty, which, at the time when such payment became due, shall be payable under the Act. During a part of the argument, it was supposed that the Act applied only to annual payments, but that is not so. If Mr. *Phipson* is right, the tax would attach on promissory notes payable by instalments. There might be some difficulty if the 40th section stood alone. But the question what is meant by “annuity or other annual payment,” is explained by Schedule (D.) of the Act itself, the 16 & 17 Vict. c. 34, which has these words:—“And for and in respect of all interest of money, annuities and other annual profits and gains not charged by virtue of the other Schedules.” It therefore applies only where the annual payment is in the nature of a profit. Now, reading that with the 40th section, it shews the meaning to be that every person who shall be liable to the payment of any annuity or other annual payment (*i. e.* liable to be charged with duty), shall be entitled to deduct. Section 40 does not apply to any case where that which is paid is not distinctly profit. If the plaintiff had sold her estate for an annuity, so calling it, the annuity would have been liable to income tax. But she has sold it for a sum which is payable by instalments, which is therefore not chargeable; and the defendants had no right under the 40th section to deduct the income tax.

BRAMWELL, B.—I am also of opinion that the defendants are entitled to judgment on the second plea.

On the other question I think that our judgment must be for the plaintiff. I am desirous to say that I disclaim in this case acting on the maxim, that a burden shall not be imposed on the public unless by clear and unambiguous language. In

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*Re Micklethwait(a), Parke, B.*, says:—"It is a well established rule that the subject is not to be taxed without clear words for that purpose; and also that every act of parliament is to be read according to the natural construction of its words." The latter is the main rule, the other subordinate. Construe the statute correctly, if its meaning can be ascertained. Maxims of the sort referred to, as frequently applied, are mere invitations to erroneous construction, though when properly understood they are quite correct. The natural course of things is, that the heir takes on the death of the person last seised; whoever seeks to disturb that rule must make out his right to do so. So, whoever seeks to impose a tax or penalty must establish the right; whoever seeks to punish must establish the guilt. The rule properly understood is, that the burden of proof is on the assessor, not that, wherever there is any doubt, a statute is to be said not to mean what it does mean. On this head I cannot help referring to that accomplished lawyer and jurist Mr. Sedgwick: he says, (Sedgwick on Statutory and Constitutional Law, p. 334,)—"These decisions, as I have said, naturally modify the old rule that penal statutes are to be construed strictly. The more correct version of the doctrine appears to be that the statutes of this class are to be fairly construed and faithfully applied, according to the intent of the legislature, without unwarrantable severity on the one hand; or equally unjustifiable lenity on the other, in cases of the Court's inclining to mercy." And afterwards, at page 336, he says:—"These decisions shew the gradual tendency of the judicial mind to disavow and renounce any right to construe statutes according to considerations of policy or hardship; and to recognize the duty of conforming on all occasions to the will of the law-making body." And, in a note at p. 335, he very pertinently asks "Whether all laws must

(a) 11 Exch. 452. 456.

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not be supposed intended to 'effect a public good;' and whether the effort 'to accomplish the intention of the legislature,' should be in any more earnest in this case than in all others?" These are the principles and considerations which I think ought to govern me in considering this case. But I think, consistently with them, that the plaintiff is entitled to judgment on the fourth plea. I cannot assent to Mr. *Phipson's* first proposition, and admit that this payment is liable to duty. I entertain very considerable doubt upon the matter. The instalments are the payment of the price of an estate deferred for thirty years, the total amount of which is probably about double the sum which would have been paid, if paid down at once. It may be that the sellers have been content to forego interest; but the presumption is, that the amount consists partly of principal and partly of interest. Were we at liberty to consider the case independently of express enactment, I should say that it would be reasonable to ascertain how much is the payment of principal, and how much is interest. But all speculation is at an end if the words and the meaning of the statute are plain. Now, inasmuch as the statute imposes a duty on the whole of an annuity, without discriminating between that part of it which is repayment of principal and that which is interest, I should say, that if there was no injustice in that, there would be no injustice in imposing the duty on a sum analogous to an annuity; though it is difficult to say that an annuity has anything in common with this payment except its annuality. In one sense it is a question of words, because, if these payments were called an annuity, income tax would doubtless be payable upon them. It was urged also that persons will now mix up interest and principal to escape the payment of duty. No doubt these arguments are very cogent. But by "An Act for granting to her Majesty duties on profits arising from

property, professions, trade and offices," it cannot be taken that the legislature meant to impose a duty on that which is not profit derived from property, but the price of it. On looking at Schedule (D.) of the 5 & 6 Vict. c. 35, it seems susceptible of this interpretation, that everything is to be referred to the title and prior part of the Act; and then this expression, "the last mentioned duties extend to every description of property or profit not in the Schedules (A), (B.), (C.)," will refer to property or profits of the same description as in those Schedules; and then when we find in section 102, "all annuities, yearly interest of money or other annual payments," it seems not an unreasonable construction to say (leaving out the word annuities) that the intention is to charge yearly interest of money and other annual payments *ejusdem generis*, that is, within the description of profits; and then, substantively, all annuities. Mr. *Phipson's* argument would shew that it would be reasonable the payment should be divided into two parts, principal and interest. Acting on the principle that the affirmative of the proposition must be made out by those who seek to impose the tax, I cannot say that such affirmative has been established to my satisfaction. But assuming that it has been, and that duty is payable on the annual instalments, Mr. *Phipson* is compelled to admit that the plaintiff herself might have been assessed. Now, if the plaintiff may be compelled to make a return and pay herself in respect of the instalments, it cannot be that the defendants can deduct the income tax before making the payments. Mr. *Phipson* says that the language of section 40 is positive. One would think, reading the words of that section alone, that nothing could be plainer. This is an annual payment; how then does it not apply? In some way we *must* hold that it does not apply, because otherwise the plaintiff would be liable to pay income tax twice over. Now the

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expression "liable to payment," is peculiar. I think it means "where any person is the owner of any property out of which a sum of money is payable, which is an annuity or annual payment, though payable as a personal debt or by virtue of any contract." It appears absolutely necessary to put a non-natural construction upon the language of this section. The argument was urged to this extent, that even if the person paying is not liable to duty, as if his income is not sufficiently large to render him liable, he may deduct income tax which he is not liable to pay. That cannot be so. Therefore, though feeling the greatest doubt on the subject, I think that the plaintiff is entitled to judgment; first, because this is not an annual payment liable to income tax; secondly, because, even if it is, the defendants can have no right to deduct income tax in respect of the whole of each payment. I own I feel the greatest doubt, because both the grounds of my decision are founded on a construction of the Act which does violence to the words of it.

WATSON, B.—I am also of opinion that the defendants are entitled to judgment upon the second plea, for the reasons which have been assigned by the Lord Chief Baron, and that the plaintiff is entitled to judgment on the fourth plea. It is a startling proposition that income tax attaches upon debts payable by instalments. It is a tax upon income; the title of the Act shews it; and, reading Schedules (A.), (B.), (C.), (D.) and (E.) of the 5 & 6 Vict. c. 35, it is obviously a yearly tax on what is called throughout income, and profits and gains. The 15 & 16 Vict. c. 34 contains similar heads of taxable matters, all of them treating that on which the tax is to attach as profit or income. The 102nd section of the 5 & 6 Vict. c. 35 is relied upon by the defendants, and this payment is said to fall within the description of an annuity. But an annuity means where an income

is purchased with a sum of money, and the capital has gone and has ceased to exist, the principal having been converted into an annuity. Annuities are made chargeable by express words. The words "other annual payments," in the same section, mean payments ejusdem generis, viz. as profits. Take the case of a will giving to a legatee money payable by instalments; as, for instance, 10,000*l.*, 5000*l.* payable at the end of the first, and 5000*l.* at the end of the second year after the testator's death. The sums so bequeathed would not be an annuity, and would be chargeable, not as income, but under the Legacy or Succession Duty Acts. If a person covenanted to pay an annual sum, not being the payment of a debt, by instalments,—as to pay 10*l.* a year to a particular person, such payment would be chargeable with income tax. But there is not a word in the Act that leads to the inference that a debt payable by instalments is chargeable with income tax; and moreover a tax cannot be imposed by implication. The same question might have arisen if it had been agreed that the payment to the plaintiff should be made by two instalments. It is impossible to suppose that income tax could attach in such a case, it being a tax upon income, and not upon capital. Then, again, it is said that these payments are compounded of interest and principal. Possibly profit is obtained by the postponement of the payment, but the Court cannot say that any part of it is interest.—As to the other point. By the 16 & 17 Vict. c. 34 the several sections of the first Act are re-enacted, and the 40th section of that Act provides that a person liable to the payment of "any annuity or other annual payment, either as a charge on any property, or as a personal debt by virtue of any contract," shall be entitled, "on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when

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such payment becomes due shall be payable under the Act." The true meaning of that is, that where the party has been assessed to the income tax, he may deduct it, though he has not actually paid the money. Could income tax have been assessed on the defendants in respect of this payment? Mr. *Phipson* says that the defendants are chargeable because they are in possession of the land. I do not see how a person, covenanting to pay the purchase money of an estate by instalments, can be charged in respect of such payment. It does not appear as a fact that the defendants are in possession of the land, and there are no provisions for assessing the duty on them. The Crown would therefore have no remedy, and the defendants would get money which they might keep, if we held that they were at liberty to make a deduction on account of income tax.

CHANNELL, B.—I concur with the rest of the Court in thinking that our judgment ought to be for the defendants on the demurrer to the second plea, and for the plaintiff on the demurrer to the fourth plea. The question raised upon the second plea is whether the plaintiff commenced this action before she had a right to do so. The defendants rely upon a proviso that no action shall be brought till the expiration of one calendar month from the time the instalment sued for was in point of fact made payable, and allege that the proviso amounts to a covenant not to sue, and does not qualify the covenant for payment of the instalments. It is not disputed that a covenant not to sue for a definite time, generally speaking, cannot be pleaded as an answer to an action. That is clearly so where the covenant not to sue for a definite period is not contained in the same deed which contains the covenant on which the action is brought. Here, however, the qualifying matter is con-

tained in the same deed. The whole of that instrument must be taken together, to see whether, putting a reasonable construction on every part of the deed, it was not the intention of the parties that these instalments should not be the subject of suit before a certain day. The Lord Chief Baron has pointed out that the covenant is not absolute, but to pay subject to the proviso. That introduces the proviso into the covenant itself. The fact that interest is not payable on the instalments unless more than one month has elapsed after the time named for the payment assists the argument for the defendants, that the covenant must be construed as a covenant to pay on a given day if the covenantors thought fit, but not so as to render them liable to an action until the expiration of one month from that day.

With regard to the fourth plea.—The contract being to pay a certain sum as the purchase money of an estate, part down and the residue by instalments, the question is whether the instalments are annual payments in respect of which income tax is payable; in other words, whether the instalments are “an annuity or yearly interest of money or other annual payment” within the 102nd section of the 5 & 6 Vict. c. 35, so as to be subject to assessment as income. In my opinion they are not. I think that the words do not include instalments which are part of a capital sum. To hold that the instalments are liable to income tax would be in effect to tax that which is capital and not income. (His Lordship read the 102nd section of the 5 & 6 Vict. c. 35.) It is clear that the proviso in this section need not be co-extensive with the enacting clause. But it has no operation except with reference to cases within the enacting clause. I am of opinion that the words “all annuities, yearly interest of money or other annual payments” do not

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include those payments which are in respect of the purchase money of an estate, and are in the nature of capital and not of income. We are not dealing with the question whether income tax might be payable in respect of such part of each instalment as consists of interest, but whether it is payable on the instalment itself. It was admitted by Mr. *Phipson* that, supposing the words "all annuities, yearly interest of money or other annual payments," in the 102nd section of the 5 & 6 Vict. c. 35, did not include those payments, the Act of the 16 & 17 Vict. c. 34 would not assist him. However, but for the 40th section of that Act, the plea would be open to the objection that it did not appear that the profits and gains out of which the annual payments were made had been brought into charge. If that had been the only objection, the 16 & 17 Vict. c. 34, s. 40, would assist the defendants. But, for the reasons given by my brother *Bramwell*, I am of opinion that is not so. The 40th section was not intended to introduce a new clause to provide for annual payments not included in the old Act.

Judgment for the defendants on the second plea, and for the plaintiff on the fourth plea.

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**HAMBRO' and Others v. The Official Manager of the HULL  
AND LONDON FIRE INSURANCE COMPANY.**

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**D**ECLARATION on two several marine policies of assurance made by the defendants on goods and freight respectively, with counts for losses adjusted and on an account stated.

Pleas to the first and second counts.—That the policies were not made as alleged. To the residue of the declaration.—Never indebted. Whereon issues were joined.

At the trial a verdict was taken for the plaintiffs, subject to a special case, in substance as follows:—

The Hull and London Fire Insurance Company was a Joint Stock Company completely registered by that name, under the 7 & 8 Vict. c. 110, on the 22nd of April, 1856.

The deed of settlement, dated the 28th of March, was duly registered in the same year. The deed formed part of the case: the material clauses were in substance as follows:—

Clause 1 provides that the proprietors shall be a Company by the name of "The Hull and London Fire Insurance Company."

Clause 2. That the business of the Company shall be to grant or effect assurances against fire, &c.; also the insurance of the wearing apparel, &c., of passengers, in steam or sailing vessels, against fire or loss by accidents at sea, &c.,

"The Hull and London Fire Insurance Company" was a Company completely registered under the 7 & 8 Vict. c. 110. The deed of settlement gave the Company power (inter alia) to transact all the branches of business usually appertaining to marine insurance, and required that in every policy the funds of the Company should alone be made liable. The Company had a seal with their name of incorporation on it. For marine insurances the directors appointed an agent to issue policies. The marine policies were headed "Hull and London Marine Assurance Company," and were signed by the agent, by

order of the Board of directors of the said Company, and had a stamp upon them with the words "Hull and London Marine Assurance Company." They contained no stipulation that the funds of the Company should alone be liable:—*Held*, first, that the "Hull and London Fire Insurance Company" were not liable on such policies, because neither the directors, nor any one else, had authority to enter into such engagements on behalf of the Company, as these policies purported to create; and there neither was nor could be any evidence that the signing of such policies by an agent in a name not that of the Company was in accordance with the usual mode of conducting the business of partnerships such as the defendants; or within the scope of the ordinary authority of the directors or agents of such Companies. Secondly, that no action lay against "The Hull and London Fire Insurance Company" on an adjustment of losses on such policies by the directors.

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of all kinds of property against loss by lightning, hailstorms, &c., and generally to transact all the business of an insurance Company; also to grant insurances against loss by accident, breakage, &c.; also to transact all the branches of business usually appertaining to marine insurance, as that business is transacted by underwriters at "Lloyd's" and all marine offices established and incorporated by act of parliament or charter.

7. That the affairs shall be conducted, subject to the provisions of the Act.

55. That every Board of directors shall have power to accept or reject absolutely every description of proposal for assurance coming under their consideration.

68. That the Board of directors shall cause a common seal to be made for the Company with such device as they in their discretion shall think fit; but so, nevertheless, that the name of the Company be inserted thereon.

69. That the Board of directors shall have power to appoint an accredited agent, &c., with or without such powers and authorities, to accept proposals for any policies to be issued by the Company, and to negotiate business relative to the objects of the Company, as the directors shall think fit to confer upon such agent, and subject to such conditions and restrictions, and upon such terms as the directors shall impose.

72. That the directors shall issue policies, and from time to time establish or alter the forms of any policies.

74. That assurances to be granted by the Company shall be effected, and all business shall be done upon such terms and conditions and in such manner as the Board of directors shall think proper.

76. That all policies, subject to the provisions of the said Act, which shall be issued by the Company, be signed by three directors at least and sealed with the common seal of the Company; all policies so signed or so

signed and sealed, as the case may be, shall be binding on the Company.

77. There shall be inserted in every policy a clause, that the capital and funds of the said Company, for the time being, undisposed of, according to the deed of settlement, shall alone be answerable for any claims under such policy, and negating an unconditional liability: Provided always, that nothing herein or in such contract shall limit the liability of any shareholder as to the performance of such contract, &c.

123. That, subject to the powers given by the general meetings, the Board of directors shall have the entire management of the affairs of the Company, &c.

The Company being so registered carried on the business of Fire Insurance at their head London office, 69, King William Street. They had a seal with the words "The Hull and London Fire Insurance Company" engraved thereon, which was kept at the head office.

In July, 1856, the directors resolved to commence the business of marine insurance. Mr. J. S. Price was elected a director, and, at a Board meeting of the directors on the 29th of July, was appointed manager of the marine branch of the Company; and it was resolved that he should be instructed not take more than 1000*l.* risk on a single line, and he was authorized to commence underwriting forthwith and to report to the Board weekly.

An office was taken at 18, Royal Exchange, and Mr. Price, acting as manager of the marine branch of the Company's business, received proposals and effected marine insurances there as for and on behalf of the Company.

At an ordinary Board meeting, it was resolved:—"The directors being by their deed empowered to undertake marine insurances of every description as fully as can be undertaken by any underwriter at Lloyds, and having appointed Mr. Price to be their underwriter, considering it is neces-

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sary for the conducting of the business in this department, that a style and title indicative of the nature of the business transacted by them should be adopted: Resolved, that the policies issued by Mr. Price shall be under the style and title of 'The Hull and London Marine Insurance Company,' and stamped with the seal of the Company applicable to marine insurance business."

In pursuance of this resolution, Price prepared a form of policy, and procured a device, seal or stamp to be made, both of which were submitted to and approved of and sanctioned by the Board of directors before Mr. Price used them; but there is no written minute thereof. The device, seal or stamp had not upon it the words "The Hull and London Fire Insurance Company," but "The Hull and London Marine Assurance Company." In December, 1856, the plaintiffs effected with Mr. Price, purporting to act on behalf of the Company, at the Company's office in the Royal Exchange, the two policies declared upon. They are in the form and sealed with the seal above mentioned.

The policies formed part of the case.

They are ordinary marine policies, headed "By the Hull and London Marine Assurance Company," and expressed that W. L. did make assurance at and from New York to London on —, in the good ship 'John G. Heckshire,' the said goods valued at —l.; that "the said Company had caused their common seal to be affixed thereto," &c. "The said Company are content with this assurance for —l."

Then, at the foot, appeared

"BY ORDER OF THE BOARD OF DIRECTORS.

"J. S. Price, Manager."



The plaintiffs paid the premiums mentioned in the policies to Price, who received them for and on behalf of the Company, and accounted to the Company for them.

The ship was lost. Price then, purporting to act as

agent for the Company, adjusted the loss upon the policies. The directors were satisfied with the adjustment, and authorized Price to sign it. A minute of their approval was entered in the minute book. Price, by order of the directors, paid 233*l.* in part of the loss to the plaintiffs. and he was afterwards instructed by the directors to ask the plaintiffs to allow time for the settlement of the claim.

The question for the opinion of the Court is, whether, under the circumstances, the action is maintainable.

*Manisty* (with whom was *J. D. Coleridge*), argued for the plaintiffs (*a*).—First, looking at the deed of settlement, the policies were binding on the Company. By clause 2, the Company are empowered to transact their marine insurance business “as that business is transacted by underwriters at Lloyd’s.” The Company therefore had power to underwrite policies not under seal. Price having been duly appointed agent for the purpose of signing policies, his signature bound the Company. The seal being superfluous did not vitiate the policies: *Hunter v. Parker* (*b*). [*Martin*, B.—Could Price bind the Company by the name of “The Hull and London Marine Assurance Company?”] There is nothing to prevent the Company from issuing policies out of their marine department. [*Martin*, B.—But the contract of a corporation must be made in the name of the corporation, or it must be shewn to have been made by the corporation itself or by their authority.] The 76th clause provides, that policies “signed by three directors, and sealed with the seal of the Company,” shall be binding; not that policies shall not be binding unless in that form. The 77th clause provides, “that there shall be inserted in every policy a clause that the capital and funds of the Company for the time being undisposed of, accord-

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(*a*) In Trinity Term, June 12. and *Bramwell*, B.  
Before *Pollock*, C. B., *Martin*, B. (*b*) 7 M. & W. 322, 342.

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ing to the deed of settlement, shall alone be answerable for any claims." It would appear from *The Prince of Wales Life Assurance Company v. Harding* (a), that a Company cannot take advantage of an omission by their own board of directors. The clause is directory; it is meant for the regulation of the business of the Company as between the directors and the shareholders; but, as between the public and the Company, it has no effect. In *Ernest v. Nicholls* (b) the contract was one wholly beyond the scope of the business for which the Company was constituted. This is in fact a partnership; the contract is one falling within the scope of the partnership authority, and is made in the manner in which such contracts are ordinarily made in the usual course of the business of assurance; therefore, though not strictly in accordance with the powers of the directors, it will bind the Company. The case is, in principle, like *Summers v. Solomon* (c). [*Bramwell*, B.—I cannot assent to the law as laid down in that case.] *Greenwood's Case* (d), *The Royal British Bank v. Turquand* (e), and *Agar v. The Athenæum Life Assurance Company* (f), seem to establish the doctrine, that, if contracts are made within the scope of the general authority of the directors, the Company will be bound notwithstanding that such contracts are in violation of particular provisions of the deeds of settlement, which regulate the mode of carrying on the business as between the directors and shareholders.

Secondly.—The Company are liable on an account stated, by reason of the adjustment.—On this point he referred to *Cocking v. Ward* (g) and *Luckie v. Bushby* (h).

*Bovill* (with whom was *Gray*), for the defendants.—The cases referred to only shew that where the defect of the

(a) Q. B., April 30, 1858.

(b) 6 H. L. 401.

(c) 7 E. & B. 879.

(d) 3 De Gex, M'N. & G. 459.

(e) 6 E. & B. 327.

(f) 3 C. B., N. S. 725.

(g) 1 C. B. 858.

(h) 13 C. B. 864.

contract arises from the want of some previous resolution or some other matter, of the existence or non-existence of which strangers may have no means of knowing, the Company cannot set up such defect to invalidate the contract. It is otherwise when the want of authority is patent on the face of the contract itself. The shareholders are bound only by contracts made with their authority, and they never gave any authority to the directors to make policies in the form of those in the present case. From *Ernest v. Nicholls* (a) and *Smith v. The Hull Glass Company* (b), it appears that the public must be deemed to have notice of the deed of settlement. The policies were not made by the Company, but by and by the authority of persons alleged to be agent of the Company. Now, a Joint Stock Company differs from a private partnership in this respect, that the directors are not persons having a general authority as partners, but having certain powers which are defined by a deed of settlement to which the public have access. [*Martin, B.—Hawken v. Bourne* (c) shews that, if this were a private partnership, the Company would be liable.—He referred also to *Peddell v. Gwyn* (d), and *Gordon v. The Official of the Sea Fire and Life Assurance Company* (e).] *Burmester v. Norris* (f) is not consistent with the view that the Company are responsible for the acts of the directors if ultra vires. [*Bramwell, B.*—In that case borrowing money was no part of the ordinary business of the Company.] The special case does not state that the issuing of policies by an agent is part of the usual business of an assurance Company, and in fact it is not usual for agents to sign policies. [*Wilde, amicus curiæ*, stated that the policies of the Marine Assurance Company are under the hands of

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(a) 6 H. L. 401.

(b) 11 C. B. 897, 926.

(c) 8 M. &amp; W. 703.

(d) 1 H. &amp; N. 590.

(e) 1 H. &amp; N. 599.

(f) 6 Exch. 796.

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the Directors, and those of the Royal Exchange Assurance under seal—not signed by an agent.] Inasmuch as persons dealing with the directors of Joint Stock Companies know that they are dealing with agents having limited authority, on well known principles, they are bound to take notice of the extent of such authority: *Atwood v. Munnings* (a), *Alexander v. Mackenzie* (b). The 7 & 8 Vict. c. 110, s. 25, and the 68th clause of the Company's deed make it an absolute condition, that the name of the Company shall be upon the seal. The Company after complete registration had no power to change its name: *Regina v. The Registrar of Joint Stock Companies* (c). The directors and those shareholders who assented to the making of these policies may be bound, but not all the shareholders.

Secondly.—The Company not being liable on the policies, there was nothing to adjust. Therefore the adjustment and alleged statement of account falls to the ground.

*Manisty*, in reply.—As to the omission of the clause limiting the liability of the shareholders, *Greenwood's Case* (d) is a direct authority that the provision in the deed of settlement for the insertion of this clause does not defeat the general authority given to the directors by other parts of the deed which are inconsistent with it, and does not affect the rights of third parties against the Company. It must be treated as directory only. [*Pollock*, C. B.—I do not understand the word “directory” as applied to such a matter. I cannot assent to any reasoning which applies the doctrine, that clauses of an act of parliament may be directory, to the clauses of a deed creating an authority. If a person tells an agent to do an act in a particular manner, on a particular day, it is not necessary for him to say that he will not

(a) 7 B. & C. 278.

(b) 6 C. B. 766.

(c) 10 Q. B. 839.

(d) 3 De Gex, M'N. & G. 459, 488.

be bound if the act is not done in that way.] Clause 74 gives a general authority to the directors. It provides that assurances may be granted by the Company in such manner as the Board of directors think proper.

*Cur. adv. vult.*

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The judgment of the Court was now delivered by

BRAMWELL, B.—We are of opinion the rule should be made absolute. The declaration is on two policies of insurance, which the plaintiffs caused to be made by and effected with the defendants: it alleged the premiums were paid to the defendants. There were counts for losses adjusted and on an account stated. The pleas to the counts on the policies denied that they were made or effected as alleged: the general issue was pleaded to the residue.

The Hull and London Fire Insurance Company was a company registered under the provisions of 7 & 8 Vict. c. 110. It was a corporation, and had a seal. The instruments in question were headed "Hull and London Marine Assurance Company," and had a stamp or device on them with the same words. The policies were not signed by two directors, nor by an officer expressly authorized thereto by resolution applying to this particular case, so as to be within the 7 & 8 Vict. c. 110, s. 44. The deed of settlement, clause 77, expressly requires that in every policy the funds of the Company shall alone be made liable. There is no such qualification in this policy. Neither the directors therefore, nor any one else, had any actual authority to enter into such an engagement on behalf of the Company as these policies purported to create. According to certain opinions, this would decide the case. But the plaintiffs denied the validity or application of those opinions, and contended that if what had been done was done in conformity with the usual practice

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of such companies or partnerships as the defendants', and within the ordinary authority of such directors and agents as had purported to act here for the defendants, that they were bound. Assuming the law to be as the plaintiffs contend, we think the case fails on the facts. There neither was nor could be any evidence that such acts as had been done here, in a name not that of the Company, were in accordance with the usual mode of conducting such matters, nor within the scope of the ordinary authority of the parties who acted. An attempt was made to support the account stated by proof of an adjustment. But if the defendants were not liable on the policies, they are not on the adjustment. Our judgment therefore must be for the defendants. It is not to be understood, however, that we express any opinion that the plaintiffs are not entitled to policies, or the benefit of policies, such as the directors might properly have issued.

Judgment for the defendants.

Nov. 5. **MARY MOREWOOD and WILLIAM BAYNE v. THE SOUTH YORKSHIRE RAILWAY AND RIVER DUN COMPANY.**

**INTERPLEADER.**—The plaintiffs averred that the goods were the goods of the plaintiffs, or one of them, which the defendants denied.

At the trial, before *Bramwell*, B., at the last Hertford Assizes, it appeared that the goods in question, having been assigned the goods to B. to secure an advance made *bonâ fide*. W. had been a colliery agent, but for six months before the date of the bill of sale had been out of employment. There was evidence that the conveyance to M. was fraudulent and void as against W.'s creditors under 13 Eliz. c. 5.—*Held*: First, that the conveyance to B. being *bonâ fide* and without notice, his title was good as against such creditors.

Secondly, that W. was sufficiently described in the bill of sale and affidavit as "gentleman." *Quare*, whether, if such description had been insufficient, B.'s title would have been affected.

seized by the sheriff of Hertfordshire under a writ of fi. fa. against one Watson, at the suit of the defendants, the execution creditors, were claimed first by Morewood and then by Bayne: whereupon the sheriff obtained an order that the parties should interplead. The facts were: that, on the 4th of February, 1848, Watson had conveyed the goods by a bill of sale by way of mortgage to the plaintiff Morewood to secure 300*l*. Watson was described in the bill of sale, which was registered, and in the affidavit filed under the statute 17 & 18 Vict. c. 36, s. 1, as "gentleman." There was evidence from which the jury might have inferred that this bill of sale, which was executed on the day when the action "*The South Yorkshire Railway and River Dun Company v. Watson*" stood in the paper for trial, was fraudulent and void as against the defendants. But on the 13th of May, in the presence of Watson, Morewood assigned the goods to Bayne by way of mortgage to secure the sum of 250*l*. then paid by Bayne to Morewood. It was proved that Watson had formerly been superintendent of the South Eastern Railway, and had been a colliery agent, but had been out of employment since August, 1857. Upon these facts, the learned Judge told the jury that it was not material whether the transfer to Morewood was fraudulent or not. If Bayne advanced his money in good faith, and Watson stood by while Morewood mortgaged to him, neither Watson nor the defendants could dispute the validity of the transaction. The jury found that the assignment to Bayne was *bonâ fide* so far as he was concerned.

*Bovill* now moved for a new trial on the ground of misdirection.—First, assuming the bill of sale to Morewood to have been fraudulent as against the defendants, the conveyance was "utterly void" by 13 Eliz. c. 5. Morewood therefore had nothing which she could convey to Bayne. [*Wat-*

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*son*, B.—Section 6 provides that nothing therein contained shall extend to any estate or interest conveyed bonâ fide and upon good consideration to any person not having notice or knowledge of the fraud.]—Secondly, the bill of sale to Morewood was not duly registered. Watson was a colliery agent, though out of employ, and should have been so described. That being so, the bill of sale was void as against the sheriff and the defendants by 17 & 18 Vict. c. 36, s. 1; and that statute contains no proviso in favour of purchasers. [*Pollock*, C. B.—“Void” does not mean utterly and absolutely void, but void *sub modo*. Here, before the question of the validity of the bill of sale arose, the property was divested out of the first assignee. An honest purchaser would not buy under a bill of sale not registered at all. If he did, probably he would not be protected. *Bramwell*, B., referred to *Allen v. Thompson (a)* and *Sutton v. Bath (b)*.]

POLLOCK, C. B.—There will be no rule. Assuming the assignment to Morewood to have been fraudulent within the statute 13 Eliz. c. 5, Bayne, having taken bonâ fide by a conveyance made by Morewood in the presence and with the assent of Watson, has a good title. As to the other point, it is not necessary to say what would have been the effect if the bill of sale had been void for want of registration, because the description of Watson was sufficient.

WATSON, B.—The question is, whether my brother *Bramwell* ought to have left it to the jury to say whether the bill of sale to Watson was fraudulent or not. The conveyance was only void as against creditors. Morewood retained an interest until some creditor interfered. The

(a) 1 H. & N. 15.

(b) 3 H. & N. 382.

6th section of the 13 Eliz. c. 5 only does what justice would require, and makes her transfer for value good. In the case of a deed void as against creditors, there must be an election to avoid the deed, but before any election the property was gone out of Morewood. As to the last point, a person who has had an occupation, ceasing to have it, may well be described as "gentleman."

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BRAMWELL, B.—I am of the same opinion. Watson, a person possessed of goods, puts them into the hands of another. That other, with his assent, sells the goods to Bayne, a bonâ fide purchaser. Watson's creditor then says that, inasmuch as the title must be traced through a malâ fide purchaser, he is entitled to treat the sale to Bayne as null. To that there are two answers. If the transfer operated as between the malâ fide purchaser and Bayne, the title of the malâ fide purchaser was defeasible; but before any step was taken to defeat such title the property passed. If the first transfer had no operation, then the bonâ fide purchaser took directly from the original owner. As to the other point, no other description could have been given of Watson. It is therefore not necessary to express any opinion whether, if the description had been incorrect, the title of the assignee could have been defeated; but I think that Mr. *Bovill's* argument on that point is not well founded.

Rule refused.

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MYERS and Others v. BAKER and Another.

In an action for a penalty under the 5 & 6 Wm. 4, c. 83, s. 6, for putting on an article made according to a patent the words "K & G Patent Elastic," without the licence of the patentee, it is no defence "that the invention was not a new manufacture."

But it is necessary to prove that such words did imitate, and were so put on by the defendant "with a view of imitating" the mark of the patentee.

**D**ECLARATION—For that whereas our Lady the Queen, before the committing of the several offences & c., and before the commencement of this suit, to wit on the 26th October, 1852, by her letters patent under the great seal & c., bearing date the day and year aforesaid, did give and grant unto the plaintiffs, their executors, & c., her Majesty's special licence, full power, sole privilege and authority that the plaintiffs, their executors, & c., from time to time and at all times during the term of fourteen years, should and lawfully might make, use, exercise and vend an invention of certain improvements in pens and penholders within the United Kingdom, & c., in such manner as to the plaintiffs, their executors, & c., should in their discretion seem meet; and that the plaintiffs, their executors, & c., should and lawfully might have and enjoy the whole profit, benefit, commodity and advantage from time to time growing, accruing and arising by reason of the said invention for and during the said term of fourteen years: To have, hold, exercise and enjoy the said licences, powers, & c. for and during and unto the full end and term of fourteen years from the said 26th October, 1852, & c. Subject nevertheless to a proviso that if the plaintiffs should not particularly describe and ascertain the nature of their invention, & c., by an instrument in writing under their hands and seals, and cause the same to be filed, & c. within six calendar months after the date of the letters patent; and also if the plaintiffs, their executors & c., should not pay, or cause to be paid, & c., the sum of 40*l*. and the stamp duty payable in respect of the certificate of such payment at or

before the expiration of three years from the date of the letters patent, that then, and in either of the said cases, the said letters patent &c. should utterly cease and determine and become void. — Averments: that the plaintiffs did, within six calendar months after the date of the letters patent, by a specification under their hands and seals, particularly describe the nature of the said invention, and cause the same to be filed; and that they did also, before the expiration of three years from the date of the letters patent, pay the stamp duty of 50*l.*, being the stamp duty required to be paid by an Act passed &c. (16 Vict. c. 5), for the purpose of satisfying and complying with the condition of the letters patent requiring the payment of the said sum of 40*l.* and a stamp duty before the expiration of three years from the date of the letters patent. That the letters patent were, before the committing of the offence by the defendants in this count mentioned, to wit on the day of the date of the letters patent, granted to and obtained by the plaintiffs for the sole making and vending of penholders, to be made and manufactured according to and by means of the said invention in the letters patent mentioned. That the plaintiffs, under and by virtue of the letters patent, and for the purpose of using and exercising a certain part of their invention which relates to improvements in penholders, did, after the making of the letters patent and before the committing of the grievances &c., and within the term of fourteen years in the letters patent mentioned, to wit on &c., and on divers other days &c., make and vend divers, to wit a million, penholders, made by the plaintiffs according to and in pursuance of the said letters patent and specification, and for the sole making of which the letters patent were granted to the plaintiffs; and upon each and every of which said penholders so made and vended by the plaintiffs, the plaintiffs, before the time

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of vending the same, caused to be, and at the time of such vending there was, stamped and marked the words "M. Myers and Sons Elastick Spring Patent Breveté." Yet the plaintiffs in fact say, that the defendants, well knowing the premises, afterwards, and after the making of a certain statute made and passed &c. (5 & 6 Wm. 4, c. 83), and also after the making of the said letters patent, and within the said term of fourteen years, and during the continuance of and before the expiration of the term by the letters patent granted, and before the commencement of this suit, to wit on &c., within that part of the United Kingdom called England, against the will and without any leave, licence or consent of the plaintiffs, or any assign or assigns of the plaintiffs, wrongfully, knowingly, injuriously, falsely, deceitfully and fraudulently, and against the form of the statute &c., upon a penholder, then wrongfully made by the defendants according to and by means of the said invention and against the said sole privilege so granted to the plaintiffs by the said letters patent, being a thing for the sole making and vending of which the plaintiffs had theretofore, to wit on &c., obtained the said letters patent, and then also being a thing for the sole making or selling of which the defendants had not obtained any letters patent whatsoever, wrote, printed, stamped and marked the words "K & G Patent Elastick K & G Patent Elastique;" and did then write, print, stamp and mark the same with a view of imitating or counterfeiting the stamp, mark and device of the plaintiffs as patentees as aforesaid: and did thereby then imitate and counterfeit the stamp, mark and device of the plaintiffs as patentees as aforesaid. Whereby and by force of the said statute the defendants have forfeited for their said offence the sum of 50*l*.: *actio accrevit*, &c.

The declaration contained three other similar counts:

the second, for putting on penholders "H & B Patent Elastick," "H & B Patent Elastique;" the third and fourth relating to marks on pens.

Pleas (inter alia).—First: Not guilty.

Third: That the said supposed invention was not any manner of new manufacture.

Replication.—The plaintiffs take issue upon the first and other pleas.

Demurrer to third plea, and joinder therein.

*Montague Smith* (*Norman* with him) argued in support of the demurrer in last Hilary Term (Jan. 18) (a).—In an action for the penalty imposed by the 5 & 6 Wm. 4, c. 83, s. 7 (b), it is sufficient for the plaintiff to shew that a

(a) Before *Pollock*, C. B., *Martin*, B., *Watson*, B., and *Channell*, B.

(b) Enacts:—"That if any person shall write, paint, or print, or mould, cast, or carve, or engrave or stamp, upon anything made, used, or sold by him, for the sole making or selling of which he hath not, or shall not have obtained letters patent, the name, or any imitation of the name, of any other person who hath, or shall have obtained letters patent for the sole making and vending of such thing, without leave in writing of such patentee or his assigns; or if any person shall upon such thing, not having been purchased from the patentee or some person who purchased it from, or under such patentee, or not having had the licence or consent in writing of such patentee or his assigns, write, paint, print, mould, cast, carve, engrave, stamp,

or otherwise mark the word "Patent," the words "Letters Patent," or the words "By the King's Patent," or any words of the like kind, meaning, or import, with a view of imitating or counterfeiting the stamp, mark, or other device of the patentee, or shall in any other manner imitate or counterfeit the stamp or mark or other device of the patentee, he shall for every such offence be liable to a penalty of 50*l.*, to be recovered by action of debt, bill, plaint, process, or information in any of his Majesty's Courts of record at Westminster or in Ireland, or in the Court of Session in Scotland, one half to his Majesty, his heirs and successors, and the other to any person who shall sue for the same: Provided always, that nothing herein contained shall be construed to extend to subject any person to any penalty in respect of stamping or in any way

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patent has been granted. The defendant cannot dispute the validity of it. The object of that enactment was to prevent the placing on a thing made according to a patent, without the licence of the patentee, a mark or device to induce the public to believe that it is made under the patent. The first branch of the clause prohibits the putting on anything made, used or sold "the name or any imitation of the name" of the patentee of such thing; the second branch prohibits the putting on such thing the words "Patent" or "Letters Patent," or "By the King's Patent," with the view of counterfeiting the mark of the patentee; and the last branch relates to counterfeiting in any manner the mark or device of a patentee. The intention is to subject to a penalty any person who imitates the name or device of a patentee on anything for which there is an *existing* patent. [*Martin, B.*—How can the validity of a patent be tried in a penal action at the suit of a common informer? There is good reason for not allowing such a question to be raised in actions not by the patentee.] As regards the public, the mischief of counterfeiting the device on a patented article, is equally great whether the patent is good or bad. Until the grant is revoked the patent is not a nullity; but exists *de facto*, which is all that the statute requires for the purposes of this action. The only questions are, whether the plaintiff has an existing patent, and whether the defendant has counterfeited the device of the patentee upon a thing made according to the patent, in order to deceive the public.

*Hugh Hill (Macrory with him).*—The plea is good. Patents not within the proviso of the 6th section of the

marking the word "Patent" upon any thing made, for the sole making or vending of which a patent before obtained shall have expired."

21 Jac. 1, c. 3, are void. The first section of that Act renders void all grants by way of monopoly. The 5th section excepts from the operation of the 1st patents at that time granted; and the 6th, which comes by way of proviso, declares that the first section shall not extend to letters patent thereafter granted for the sole working of "any manner of new manufacture." Therefore, by the express words of the statute, unless the patent is for a new manufacture, it is void. [*Pollock*, C. B.—It may seem absurd to try the validity of a patent in an action for a penalty, yet suppose the patent was absolutely void on the face of it, and the defendant set it out in his plea and demurred: is the informer to recover the penalty? My present impression is that the word "patent" in the 5 & 6 Wm. 4, c. 83, s. 6, means a valid patent.] The preamble of that Act, reciting that "it is expedient to make additions to and alterations in the present law touching letters patent for inventions, as well for the better protecting of patentees in the rights intended to be secured by such letters patent," shews that the legislature were dealing with valid patents. The 2nd section, which provides for the case of a patent granted in respect of an invention for which some person has obtained a patent before, uses the words "letters patent for any invention or supposed invention." In the 7th section the words are "letters patent for the sole making," &c. [*Martin*, B.—The plaintiff has obtained letters patent for the sole making and vending a penholder: the defendant professes to have the grant of a patent, and that it is valid, for he has put the word "Patent" on a penholder. The object of the statute is to give to persons, who have obtained a patent *de facto*, protection for their mark or device.] If the plaintiffs' contention is right, the common informer is in a better position than the patentee. But the object is only to give to a patentee an effectual remedy if

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his trade mark is counterfeited, and is merely ancillary to his rights under the patent.—They referred also to *Chollett v. Hoffman* (a).

*Norman*, in reply.—It is clear that something more is contemplated than a remedy to the owner of a valid patent, because the penalty is given to the common informer and not to the patentee. As to the objection suggested by the Lord Chief Baron: it is consistent with a plea, “that the patent was not granted for any manner of *new* manufacture,” that it was for *some* manufacture,—for some thing which *prima facie*, and but for the want of novelty, would be the subject of a patent. A patent for such a thing cannot be treated as a nullity. The sale of it may form a valid consideration for a promise; and if, in an action on such promise, the *grant of the patent for the sole making, &c.* is traversed by a plea of non concessit, evidence of the existence of the letters patent under the great seal proves the issue: *Smith v. Neale* (b), *Lawes v. Purser* (c). A fortiori, proof of the existence of the patent in fact will satisfy the words “shall have obtained letters patent” in the section now under consideration. The preamble of the statute shews that it was enacted, not only for the benefit of patentees, but “for the more ample benefit of the public.” It is clear that the legislature were dealing with patents *de facto* existing, and other than those only which are valid, because both the 1st and 2nd sections relate to remedying the defects of what were previously void patents. It is consistent with the plea that the vice of this patent may have been one capable of being cured by a disclaimer or confirmation under those sections. To treat it as an offence to put the word “Patent” on a thing for which there is an

(a) 7 E. &amp; B. 686.

(b) 2 C. B. N. S. 67.

(c) 6 E. &amp; B. 930.

existing void patent is in analogy to the enactments of the Designs Acts, 5 & 6 Vict. c. 100, s. 11, 6 & 7 Vict. c. 65, s. 4. [*Pollock*, C. B.—Those statutes were passed long subsequently to that now in question.] But if the language will admit of it, it is a legitimate mode of construing a statute to treat the statutes, so far as possible, as a consistent body of law.

The Court directed that the case should stand over until the issues in fact had been tried.

*Cur. adv. vult.*

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At the trial, before *Cockburn*, C. J., at the last Warwick Assizes, the plaintiffs proved that they had purchased and traced to the defendants some penholders and pens marked as mentioned in the second and fourth counts of the declaration, and made according to their patent. The plaintiffs then, through an agent in London, ordered of the defendants, who accordingly manufactured and supplied, a large number of penholders and pens marked as mentioned in the first and third counts. The defendants proved that the first mentioned lot of penholders and pens were part of a quantity manufactured by them in pursuance of the orders of Messrs. Heintz & Blankertz, dealers, who supplied the pattern; that the words "Patent" and "Elastic" were commonly put on penholders by manufacturers in Birmingham, and they swore that they had no intention of imitating the marks of the plaintiffs.

The learned Judge told the jury that the intention of the defendants was of the essence of the offence; that the plaintiffs were bound to shew that the defendants had put the marks upon the articles in question with the intention of imitating the marks used by the plaintiffs on their patented articles; that unless they thought that the marks on the pens and penholders manufactured by the

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defendants were substantially the same as, and intended to counterfeit, the plaintiffs' marks, they should find for the defendants. The jury found a verdict for the defendants.

*Macaulay*, in the present term, obtained a rule for a new trial, on the ground that the learned Judge ought to have directed the jury that the offence charged in the declaration was complete on proof that the word "Patent" was stamped by the defendants on an article sold by them, and for which the plaintiffs had obtained a patent; and that he ought to have submitted to the jury whether, in point of fact, the marks upon the articles sold by the defendants were such as to lead the public to suppose they were the plaintiffs' patented articles.

*Hayes*, Serjt., and *Alfred Wills* now shewed cause (a).— This is a penal action, and therefore the intention of the defendants is material. Previously to the passing of the 5 & 6 Wm. 4, c. 85, s. 7, it was no offence to use the trade mark or stamp of a patentee unless it was used fraudulently. The intention of the legislature in passing that enactment was not to create a new liability, but to remedy the inconveniences of the old action, in which there was always a difficulty in proving any special damage; and the statute must be taken to have been passed with reference to the cases as to trade marks; such as *Rodgers v. Nowill* (b), *Crawshay v. Thompson* (c), *Sykes v. Sykes* (d). The section contemplates several offences: first, putting on a thing for which a person shall not have obtained letters patent "the name, or other imitation of the name, of any other person who hath or shall have obtained letters patent," without leave, &c.: secondly, stamping or marking "the

(a) Nov. 22. Before *Pollock*,  
C. B., *Bramwell*, B., *Watson*, B.,  
and *Channell*, B.

(b) 5 C. B. 109.

(c) 4 Man. & G. 357.

(d) 3 B. & C. 541.

word 'Patent,' the words 'Letters Patent,' or the words 'By the King's Patent,' or any words of the like kind, &c., with a view of imitating or counterfeiting the stamp, mark or other device of the patentee." According to ordinary rules of grammatical construction, the words "with a view of imitating or counterfeiting the stamp, mark or other device of the patentee" apply to the whole of the preceding part of the section. [*Bramwell, B.*—The enactment is highly penal, and must be construed strictly.]

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*Mellor and Field*, in support of the rule.—The intention is not material if the defendant puts upon articles made according to a patent the words "Patent," "Letters Patent," or the like. The Act is for the protection, not of the patentee only, but of the public. The penalty is given one half to any person who informs, and the other to the Crown. It may be admitted that at common law it is not unlawful to use the mark of a patentee, unless it is done fraudulently. But this enactment makes it wrongful to put on a thing made according to a patent the words "Patent," "By Letters Patent," &c., without the licence of the patentee. In putting such a mark on goods made according to a patent, it must be taken that the party does it with a view to imitate or counterfeit the mark of the patentee, and to pretend to be the grantee of the Crown. [*Bramwell, B.*—It is not made an offence to put the word "Patent" on an article not the subject of an existing patent.] The statute assumes that words such as those in question would be put on with a view of imitating the mark of a patentee.

*POLLOCK, C. B.*—We are all of opinion that the rule must be discharged. This is an action for a penalty under the 5 & 6 Wm. 4, c. 83, s. 7, and the question is, whether that enactment must be read as if the expression "with a

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view of imitating or counterfeiting the stamp, mark or other device of the patentee" applies to the whole of the antecedent part of the section, or only to the clause which immediately precedes it. Penal statutes should be construed according to what appears to be their true meaning. I disclaim acting on the notion that if one mode of reading such a statute creates a penalty, and another does not, the statute must be interpreted so as not to make a party liable to a penalty. But in endeavouring to ascertain the true meaning, light may be thrown upon the subject if we discover that, by adopting a particular construction, a party would be made liable to a penalty in a case where there is no reason for imposing it. The jury have found that in the present case the defendants acted with good faith and had no intention of counterfeiting the plaintiffs' mark. Reading the statute according to the ordinary rules of construction, the words "with a view of imitating or counterfeiting" the mark of the patentee apply to the whole subject matter. The effect is, that if a mark is put on innocently, without any fraudulent intention, or any view of imitating the mark of the patentee, no penalty is incurred. This appears to be the true construction, and it is entirely consistent with reason and justice.

BRAMWELL, B., WATSON, B., and CHANNELL, B., concurred.

POLLOCK, C. B., said (Nov. 23).—The Court are of opinion that the third plea is bad, and therefore there must be judgment for the plaintiffs upon the demurrer.

Rule discharged.

Judgment for the plaintiffs on the demurrer to the third plea.

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THE first count of the declaration stated, that the defendants were common carriers of goods and chattels for hire from Bristol to Falmouth by water; and the plaintiffs, whilst they were such common carriers, delivered to them, and they then accepted from the plaintiffs, two casks of brandy to be securely carried and conveyed by them from Bristol to Falmouth, and there, to wit at Falmouth, safely and securely delivered for the plaintiffs, for certain reasonable rewards to the defendants in that behalf: Yet the defendants, not regarding their duty, &c., did not nor would safely or securely convey the said casks and their contents from Bristol to Falmouth, nor there to wit at Falmouth, safely or securely deliver the same for the plaintiffs; but, on the contrary thereof, the defendants so carelessly and negligently conducted themselves in the premises that, by and through the carelessness, negligence and default of the defendants, one of the casks became staved, broken and damaged, and a large quantity of the brandy therein leaked out and escaped, &c.—The second count stated, that the plaintiffs delivered to the defendants, and

The defendants, owners of a steam-vessel plying between Bristol and London, issued every month hand-bills of the times of their vessels sailing, and which contained a notice that they “received goods for shipment on the conditions and agreement only that they are not liable for inward condition, leakage and breakage, and that they would not receive any goods for conveyance by their vessels except upon the terms that they should not be responsible for any loss or damage of or to such goods from any cause whatever during the voyage.” On the 8th March, the plaintiffs, who had received these hand-bills, shipped on board one of the defendants’ vessels two casks of brandy to be carried to Falmouth. On the 11th March the shipping broker delivered to the plaintiffs a freight note, at the foot of which was a notice that the defendants did not hold themselves liable for leakage of oils, spirits or other liquids, unless from bad stowage. In the course of the voyage one of the casks of brandy was staved in and nearly all its contents lost:—*Held*, that the notice in the handbills constituted the terms of the contract under which the goods were shipped, and that those terms were not qualified by the notice at the foot of the freight note, and consequently the defendants were not responsible.

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the defendants accepted from the plaintiffs, two casks of brandy, to be by them, for certain reasonable reward in that behalf, carried and conveyed for the plaintiffs from Bristol to Falmouth by a certain ship of the defendants, which was then about to proceed and sail, and did accordingly proceed and sail, from Bristol to Falmouth, upon the terms, amongst others, that the defendants should take due care of the said goods during the voyage, and on the arrival of the said goods at Falmouth, should forthwith deliver the same at Falmouth for the plaintiffs: Yet the defendants did not nor would take due care of the said goods during the voyage, and did not nor would, on the arrival of the said goods at Falmouth, deliver the same for the plaintiffs; but, on the contrary thereof, the defendants so carelessly and negligently conducted themselves in the premises that, by and through the carelessness, negligence and default of the defendants, and during the voyage, one of the said casks became staved, broken and damaged, and a large quantity of the brandy therein leaked out, &c.

Pleas (inter alia) to first count.—First: that the defendants, at the time of the delivery of the goods to them by the plaintiffs, were not common carriers of goods and chattels for hire, as in the first count alleged.

Fifth, to the breach in the first count.—That the cask and its contents in the breach mentioned were delivered by the plaintiffs, and were accepted by the defendants, upon the terms and special contract that the defendants should not be liable for inward condition, leakage or breakage, nor for any loss or damage of or to such last mentioned goods from any cause whatsoever during the said transit, and not otherwise. And that the alleged damage to the last mentioned goods was and is a damage which by the aforesaid terms and contract the defendants are not liable

to make good to the plaintiffs, and for which they are not in any manner answerable in this action.

Sixth: to so much of the second count as relates to the damage, leaking and loss of the brandy and cask therein alleged to have been staved, broken and damaged.—That the plaintiffs did not deliver to the defendants, nor did the defendants accept the same cask of brandy to be by them carried upon the terms, amongst others, in the second count alleged in that behalf.

Ninth: to the same part of the second count as is by the sixth plea pleaded to.—That the said cask and its contents was delivered to and was accepted by the defendants under and subject to the terms and special contract in the fifth plea mentioned, and not otherwise; and that the damage to the last mentioned goods was and is a damage which by the aforesaid terms and contract the defendants are not liable to make good to the plaintiffs, &c.

The replications joined and took issue on the pleas.

At the trial, before *Watson, B.*, at the last Bristol Assizes, it appeared that the defendants were owners of a steam vessel called the "Pioneer," which plied between Bristol and London, calling (amongst other places) at Falmouth. On the 8th March last, the plaintiffs, who were merchants in Bristol, shipped on board the "Pioneer" two casks of brandy consigned to a wine merchant at Falmouth. The casks were in good condition when delivered to the defendants, but in the course of the voyage one of them was staved in and its contents nearly lost. Evidence was adduced to shew that this was caused by the negligence of the defendants. The defendants proved that every month they circulated amongst the merchants and others at Bristol handbills of the times of their vessels sailing, and that for several months, up to the time the casks of

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brandy were shipped, these handbills had been left at the counting-house of the plaintiffs, and had been received by them. These handbills contained the following notice :—

“ The Company give notice that they receive goods for shipment on the conditions and agreement only of shipping the same under a bill of lading or receipt in the form adopted by the owners of the said vessels ; and if, from any cause whatsoever, goods shall be shipped without a bill of lading or receipt, the owners of the said vessels are only liable to convey and deliver the same on the terms of the bill of lading or receipt adopted by them, viz., that these vessels have leave to sail with or without a pilot ; to touch and stay at intermediate ports ; with liberty to tow and assist vessels ; and that the owners or agents have power to tranship said goods—and are not liable for inward condition, leakage and breakage, contents or weights of packages,—nor for the incorrect delivery of goods from insufficiency of marks or numbers, nor from any accident, loss or damage arising from the act of God, the Queen’s enemies \* \* \* nor from any consequences of the causes above stated. The owners also give notice that they will not receive any goods for conveyance by their vessels except upon the terms that they shall not be responsible for any loss or damage of or to such goods from any cause whatever during the transit.”

The plaintiffs then proved that on the 11th March the defendant Edwards, who acted as shipping broker for the defendants, sent to the plaintiffs the following freight note :—

Bristol, 11 March 1858.

Messrs. T. Phillips &amp; Co.

To John Edwards &amp; Co.,

77, Quay.

For Freight and Charges to *Falmouth* per *Pioneer*.

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The within-named Goods are now landing at and at your risk; the Freight and Charges must be paid before delivery.

| Marks and Nos. | Goods.               | Weight. | Rate. | Amount. |
|----------------|----------------------|---------|-------|---------|
| B B<br>97      | 2 Butts } Compounds. | Gal.    | 1/2   | £ s. d. |
|                | 1 Hhd. }             | 302     |       | 1 17 9  |
|                | 1 Hhd. Compounds.    | 74      |       | 0 9 0   |
|                |                      |         |       | 2 6 9   |

g> Goods consigned to order, or warehoused for the convenience of parties to whom they are consigned, are entirely at the risk and expense of the proprietors. All goods are subject to lien in favour of the shipowners generally, not only for the freight and charges thereon, but for all previously unsettled freights and charges. The owners of the vessels do not hold themselves liable for leakage of oils, spirits, or other liquids, or breakage of glass or furniture, unless from bad stowage.

It was submitted on behalf of the defendants that they did not undertake to carry the goods as common carriers, nor on the terms stated in the second count, but on the terms mentioned in the handbill; and that the fifth and ninth pleas were proved. It was contended on behalf of the plaintiffs that the terms of the handbill were qualified by the notice at the foot of the freight note. No question was left to the jury; but it was arranged that the verdict should be entered for the defendants on the fifth and ninth pleas, and for the plaintiffs on the first and sixth issues with 50*l.* damages; the plaintiffs to be at liberty to move to enter the verdict for them on the fifth and ninth pleas; but if the defendants should retain the verdict on those pleas, the Court to say how the other issues were to be entered.

*Collier*, in the present Term, obtained a rule nisi accordingly; against which

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*Montague Smith* and *J. B. Karslake* shewed cause (November 18).—The fifth and ninth pleas were proved. The defendants contracted to carry the goods on the terms stated in the handbills, and the contract is not qualified by the freight note. A carrier may undertake to carry on the terms that he shall not be responsible for any loss or damage whatsoever: *Austin v. The Manchester, Sheffield and Lincolnshire Railway Company* (a), *M<sup>r</sup> Manus v. The Lancashire and Yorkshire Railway Company* (b), *Austin v. The Manchester, Sheffield and Lincolnshire Railway Company* (c), *The York, Newcastle and Berwick Railway Company*, appellants, *Crisp*, respondent (d), *Carr v. The Lancashire and Yorkshire Railway Company* (e). Those were cases of railway companies, and the principle applies a fortiori to ordinary carriers, because in the case of railway companies the conditions must be reasonable: 17 & 18 Vict. c. 31, s. 7. The plaintiffs were cognizant of the notice contained in the handbill, and must be taken to have assented to those terms: *Walker v. The York and North Midland Railway Company* (f). Suppose there had been a bill of lading: could it have been contended that the defendants did not carry on the terms therein mentioned? The broker had no authority to vary the contract; and even if he had authority to deliver the freight note, that document cannot affect the terms on which the goods were previously shipped. The freight note does not apply to the shipment of goods, but only to their landing. If the handbill and freight note be read together as forming the contract, though the fifth and ninth pleas may not be proved, still there is a variance; for the defendants neither contracted to carry as common carriers, nor on the terms

(a) 10 C. B. 454.

(b) 2 H. &amp; N. 693.

(c) 16 Q. B. 600.

(d) 14 C. B. 527.

(e) 7 Exch. 707.

(f) 2 E. &amp; B. 750.

mentioned in the second count: *Shaw v. The York and North Midland Railway Company* (a). *White v. The Great Western Railway Company* (b) is an express authority that the defendants did not receive the goods as common carriers, and the second count is founded on the ordinary duty which arises on the delivery of goods to a carrier, where there is no special contract. Either the fifth and ninth pleas were proved, or the declaration was not proved.

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*Collier and Prideaux*, in support of the rule.—The notice contained in the handbill does not constitute a contract, though, if there had been no other document, a jury might have inferred a contract from it. The handbill was merely a general notice to the public; the freight note was delivered with reference to this particular transaction, and therefore overrides the general notice. If a carrier gives two notices, he must be bound by that one which is less beneficial to himself: *Mum v. Baker* (c). Formerly, it was considered that a common carrier could not limit his responsibility: later decisions shew that he may; but there is no authority that he can altogether extinguish it. [*Pollock*, C. B.—I doubt whether he can; but I express no opinion either way. It is clear that an innkeeper cannot refuse to receive a guest. *Watson*, B.—The law with respect to carriers is stated by *Parke*, B., in *Johnson v. The Midland Railway Company* (d).] The two notices are inconsistent with each other, and if the first is qualified by the second, the fifth and ninth pleas were not proved. It would be difficult to frame a declaration on a contract composed of the two notices, and that which is posterior in point of time, or less beneficial to the carrier, must prevail. But, assuming that the two notices constitute the contract,

(a) 13 Q. B. 347.

(b) 2 C. B. N. S. 7.

(c) 2 Stark. N. P. 255.

(d) 4 Exch. 367.

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the plaintiffs are entitled to a verdict on the second count ; for such a notice does not exempt the carrier from the duty of taking common care of the goods : *Phillips v. Clark* (a).

*Cur. adv. vult.*

POLLOCK, C. B., now said.—In this case, which was tried before my brother *Watson* at Bristol, a rule was obtained to enter the verdict for the plaintiffs on the fifth and ninth pleas. We are of opinion that the rule ought to be discharged, and that the verdict ought to stand for the defendants on those pleas. The question turns upon whether a notice, contained in a handbill, of the times when the defendants' vessel would sail, was binding so as to form a contract between the parties ; for, if so, the fifth and ninth pleas were proved, and they constitute an answer to the action. We are of opinion that the contract was upon the terms mentioned in the handbill, which was every month circulated amongst the public, and which was proved, and indeed admitted by Mr. *Collier* on the argument, to have been received by the plaintiffs. The only difficulty has arisen from there being a freight note, the terms of which do not correspond with the terms of the handbill. Mr. *Collier* contended, on the authority of the case he cited, that where there are two sets of terms, the carrier is bound to consider that one as binding which is least favourable to himself and most favourable to those he deals with—a rule of law perfectly clear. But, on looking at the freight note, it appears to us manifest that the notice at the foot of it does not apply to the case of goods departing from the port, but to goods arriving at the port. It seems to have been used (possibly by mistake) for the purpose of intimating the amount of freight charged, and not as indicating the terms on which the goods were carried. The defendants gave notice that they received goods on the condition and

(a) 2 C. B. N. S. 156.

agreement only of the goods being shipped under a bill of lading in the form usually adopted; and they also gave notice that they would not receive any goods for conveyance by their vessels except upon the terms that they should not be responsible for any loss or damage of or to such goods from any cause whatsoever during the transit. For these reasons we are of opinion that the fifth and ninth pleas correctly stated the contract, and that those pleas were proved. It may be observed, as an additional reason for saying that the contract is that which was entered into at the time the goods were shipped, that the freight note was a matter occurring some days afterwards. The rule to enter the verdict for the plaintiffs on the fifth and ninth pleas will therefore be discharged.

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Rule discharged as to setting aside the verdict for the defendants on the fifth and ninth pleas; and the issues on the first and sixth pleas also entered for the defendants.

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HOLT v. FROST.

Nov. 19.

*QUAIN*, on behalf of the sheriff of Derbyshire, had obtained a rule calling on the plaintiff, the execution creditor, and Messrs. Buller and Phillips and Ann Wright, claimants, to shew cause why they should not appear and state the nature and particulars of their respective claims to the goods seized by the sheriff under the writ of *fi. fa.* in this cause, and maintain or relinquish the same, &c.

It appeared from the affidavits of the undersheriff and the sheriff's officer that, the plaintiff having recovered judgment against the defendant for 184*l.* on the 29th of September, the sheriff seized under a *fi. fa.* certain machinery alleged to be the property of the defendant, but

Goods having been seized in execution and claimed, the mere fact that the undersheriff was attorney for the claimant at the time of the seizure, and prepared and caused to be served on himself as undersheriff a notice of claim on behalf of such claimant, will not disentitle the sheriff to relief under the interpleader Act.

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which was in the possession of a servant of Messrs. Buller and Phillips. On the 1st of October a notice of claim, signed by F. Flower as agent for Ann Wright, was served on the sheriff. Previously to the service of this notice Messrs. Simpson and Taylor had been the attorneys of Miss Wright. Mr. J. J. Simpson, one of the partners, was also undersheriff, and on the 2nd of October, as undersheriff, caused an interpleader summons to be issued. On the 5th, having been informed that Messrs. Buller and Phillips were in possession under a distress for interest due on a mortgage to them, he gave notice to the plaintiff that he should not attend the summons. On the 6th the plaintiff's attorney wrote to the undersheriff denying the right of Messrs. Buller and Phillips to distrain upon the whole of the goods, and on the same day Miss Wright served a second notice of claim. The sheriff's officer could not ascertain before the 23rd whether Messrs. Buller and Phillips claimed the whole of the goods. On the 27th a fresh interpleader summons was obtained by the sheriff. Ann Wright swore that she claimed under two indentures dated respectively the 17th of September, 1836, and the 25th of July, 1857, by which the machinery was conveyed to her, subject to a mortgage to Messrs. Buller and Phillips.

The plaintiff filed an affidavit in reply, from which it appeared that the notice of claim by Ann Wright, served on the 1st of October, had been prepared by Mr. Simpson the undersheriff and signed by Flower, who knew nothing of the matter, at his request, and that the indenture of the 25th of July, 1857, had been prepared by Mr. Simpson. On the 27th of October Simpson and Taylor wrote to the plaintiff, stating that they were not concerned for Miss Wright, and referring to a Mr. Baker as her solicitor. On the plaintiff's applying to Mr. Baker for permission to inspect Miss Wright's deeds, Mr. Baker referred him to

Mr. Simpson. The plaintiff swore that he believed that the employment of Mr. Baker was merely colourable.

In an affidavit in reply, the undersheriff swore that, believing that the sheriff could not call on the parties to interplead, he caused an appraiser to go over the mills with Miss Wright's security, for the purpose of ascertaining what effects on the premises were not comprised in it, and that the notices of Miss Wright's claim were given by his advice. Before the undersheriff's agents were instructed to issue the interpleader summons, he had determined to cease to act as solicitor for Miss Wright, and had since done no act in that capacity: that, in pursuance of instructions from Miss Wright, on the 25th of October he had served Mr. Baker, as her solicitor, with a copy of the interpleader summons: he denied collusion, and alleged that he had acted *bonâ fide* and not for the purpose of delay.

The summons was heard before *Martin, B.*, at Chambers, when, upon an objection being made to the sheriff's right to call on the parties to interplead, the learned Judge referred the parties to the Court.

*Field* (for the execution creditor) shewed cause.—The undersheriff upon the lodging of the writ became bound to deal indifferently between the parties. He should have abstained from interference with the operation of the execution. Instead of that he appears to have advised and prepared Miss Wright's notices of claim, and caused Flower to sign them, and to have gone over the premises with her security. [*Bramwell, B.*—Suppose he had not been concerned for Miss Wright, if he knew of her claim might he not for his own protection have gone to her and advised her to make a claim?] A practising solicitor ought to cease to act as such in respect of a matter placed in his hands as an officer of the Crown. In *Dudden v. Long (a)*, it was

(a) 1 Bing. N. C. 299.

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held that where the undersheriff's partner was concerned for some of the parties, the sheriff was not entitled to relief: *Tindal*, C. J., saying:—"Before we accede to any application under the interpleader Act we must see that he stands quite clear of any connection with either of the parties." That doctrine was acted upon in *Ostler v. Bower* (a), where the undersheriff was the son and partner of the plaintiff; and in *Cox v. Balne* (b), where the undersheriff, acting as attorney for certain creditors of the defendant, informed them of a writ of *fi. fa.* at the suit of the plaintiff having been placed in his hands to execute. [*Watson*, B.—In the case last cited the undersheriff's act created the adverse claim.] Here the sheriff has given assistance to a claimant. After the abandonment of the first interpleader summons, and after the delay which has taken place the sheriff is not entitled to relief.—On this point he referred to *Crumph v. Day* (c) and *Ridgway v. Fisher* (d).

*Quain*, for the sheriff, and *Phipson* and *Gray*, for Miss Wright and Messrs. Buller and Phillips, were not called on.

POLLOCK, C. B.—We are all of opinion that the rule ought to be made absolute for an interpleader. There is no reason why an attorney being undersheriff should not practice, and when no prejudice is sustained by the course adopted, and there is no misconduct or collusion,—when the sheriff has no interest, and there are other litigant parties on whom the expense of the contest ought to fall, we ought not to refuse relief. In the present case there are no circumstances which should induce us not to relieve the sheriff. There are some old cases in which greater strictness prevailed, where the sheriff's application

(a) 4 Dowl. 606.

(c) 4 C. B. 760.

(b) 2 D. &amp; L. 718.

(d) 3 Dowl. 567.

was defeated, under circumstances in which we should not refuse to assist him at the present day.

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BRAMWELL, B.—In this case there is no imputation of any improper—that is dishonest—conduct against the undersheriff; the execution creditor has sustained no prejudice, and therefore justice requires that we should relieve the sheriff by ordering the parties to interplead.

WATSON, B.—I am of the same opinion. There has been no collusion. It is no more than this, that the undersheriff being an attorney and knowing of Miss Wright's mortgage, directed Flower to make a claim for her. In *Ostler v. Bower* (a) the undersheriff was interested; in *Cor v. Balne* (b), he had communicated facts which accelerated the issuing of a fiat in bankruptcy against the defendant, and so had created the claim. The delay in applying to the Court has been satisfactorily explained.

CHANNELL, B.—If I could see that the parties had been prejudiced by the act of the undersheriff, I should not interfere. But in a case where no prejudice has been sustained, I should pause before refusing relief to the sheriff. The affidavits do not make out any case of collusion.

Rule absolute (c).

(a) 4 Dowl. 605.

(b) 2 D. & L. 718.

(c) The 1 Hen. 5, c. 4, which provided that no undersheriff, &c., should be attorney in the King's Courts during the time he was in office, was repealed by

the 1 Vict. c. 55, s. 1; and the 22 Geo. 3, c. 46, s. 14, which prohibited an undersheriff from acting as an attorney at general or quarter sessions, was repealed by the 6 & 7 Vict. c. 73, Sched. 1, Part 1.

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## THE ATTORNEY GENERAL v. MUNBY.

D. by his will bequeathed to W. certain personal estate of the value of 7,487l.


upon trust for D.'s daughter, the wife of B., during her life, and provided she died without issue, he bequeathed the same to B., his heirs and assigns. B. by his will bequeathed the said and all his other personal estate to S. and the defendant, upon trust to pay debts and legacies, and as to the residue in trust for such purposes as his wife should by her will appoint, and in default of such appointment, in trust for her executors and administrators. B. appointed S. and the defendant executors of his will, and died, leaving his wife him

surviving. After the death of B. his wife appointed the defendant with two other persons trustees of the will of D. in the place of W., and all the personal estate of D. was assigned by D. to them. The wife of B. appointed the defendant, with the two last mentioned persons, executors of her will, and bequeathed to them the whole of her personal property on certain trusts. She died without ever having had issue, and more than two years after her death S. and the defendant, on being applied to for payment of legacy duty on the above sum of 7,487l., by a certain writing, signed by them, reciting the bequest by D. to B., professed to disclaim and renounce such bequest.—*Held*, that it was not competent for the defendant to disclaim the bequest after B. had accepted and bequeathed it, and that the defendant was liable as executor of B. to pay a legacy duty of 10l. per cent.

**I**NFORMATION by the Attorney General for legacy duty, charging the defendant as executor of V. Bealby.—Plea: nil debet.

At the trial a special verdict was found, which (so far as material) is as follows:—Robert Driffeld, on the 24th February, 1813, made and published his will in writing, and thereby gave and bequeathed to G. Wailes all and every his goods, plate and linen, liquors and other stocks and furniture in and about his dwelling house: Upon trust to permit his daughter Ann Bealby, the wife of Varley Bealby, to use and enjoy the same during her life. And the testator likewise gave to G. Wailes, all his government stock and monies in the funds, and other his personal estate and effects whatsoever and wheresoever: Upon trust to pay the dividends, interest, &c., to his said daughter during her life for her sole use: Upon trust to pay such legacies as the testator should by any paper signed by him direct or appoint, and in default of such appointment upon trust for such person or persons as his said daughter should by her will devise and bequeath the same. And the testator appointed G. Wailes sole executor of his will. The testator, on the 23rd September, 1814, made and published a codicil in writing to his will, and thereby gave and bequeathed, after the decease of his said daughter,

provided she died without leaving any child, to certain persons in the codicil mentioned certain specific legacies. And, after the decease of his said daughter, the testator gave and bequeathed all his household furniture, plate, linen and china, with all the residue and remainder of his personal estate of what nature or kind soever, after payment of the legacies in the codicil specified, to his son in law, the said V. Bealby, his heirs and assigns. And the testator, on the 3rd December, 1816, died, without having altered or revoked his will or codicil. G. Wailes, on the 11th April, 1817, proved the will and codicil, and took upon himself the execution thereof and of the trusts therein mentioned, and became and was, and continued to be, such executor and trustee until the appointment of new trustees and the assignment hereinafter mentioned. V. Bealby, on the 9th June, 1836, made and published his will in writing and thereby gave and bequeathed the personal estate which he was entitled to under the will of R. Driffield, the father of his wife, and all other his personal estate whatsoever unto S. Spencer, S. Johnstone and J. Munby: Upon trust thereout to pay his funeral and testamentary expenses, and the debts which he should owe at his decease, and the pecuniary legacies and the legacy duty upon the same legacies thereinbefore bequeathed: And upon further trust to pay the expences of certain policies of insurance, and subject to the trusts aforesaid: Upon trust to invest the residue in the public stocks or funds, or upon real or government securities at interest, and he directed that the said S. Spencer, S. Johnstone and J. Munby and the survivors, &c., of them should stand possessed and interested of and in the monies so to be invested, upon trust to pay certain annuities and legacies therein mentioned. And as to the residue of the said trust monies, he directed that the same should be upon the trusts following, namely: Upon

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such trusts, and for such purposes, and subject to such powers, provisoes and declarations as Ann Bealby, by her will or any codicil thereto, should direct or appoint, and, in default of such direction or appointment, in trust for the executors and administrators of his said wife as part of her personal estate. And V. Bealby appointed the said S. Spencer, S. Johnstone and J. Munby executors of his will. V. Bealby, on the 22nd October, 1836, died, without having altered or revoked his will, and leaving the said Ann Bealby him surviving; and the said S. Spencer, S. Johnstone and J. Munby, on the 2nd May, 1837, proved the last mentioned will, and took upon themselves the execution thereof. After the death of V. Bealby, on the 6th June, 1845, G. Wailes declined further to act in the execution of the trusts of the will of R. Driffield; and, by an indenture then made between Ann Bealby of the first part, G. Wailes of the second part, B. Hague, J. Swann and the said J. Munby of the third part, Ann Bealby, under and by virtue of the powers given to her by the will of R. Driffield, nominated and appointed B. Hague, John Swann and J. Munby to be trustees of the personal estate by the will and codicil of R. Driffield bequeathed as aforesaid, in the place of G. Wailes; and G. Wailes, by the direction of Ann Bealby, by the said indenture, assigned unto B. Hague, J. Swann and J. Munby all the personal estate then vested in G. Wailes as such executor and trustee under the will and codicil of R. Driffield, upon the trusts in the said will and codicil declared. That, according to the terms and true intent and meaning of the said indenture, the whole of the personal estate and effects of R. Driffield therein comprised were assigned, delivered and transferred by G. Wailes, and actually came into the hands and possession of B. Hague, J. Swann and J. Munby, as such new trustees in the place of G. Wailes, and so con-

tinued in their hands and possession until the death of Ann Bealby, and from thence until the day of exhibiting the said information. After such appointment and assignment, that is to say on the 19th October, 1848, Ann Bealby made and published her will, and thereby appointed B. Hague, J. Swann and J. Munby executors of her will, and gave and bequeathed to them the whole of her personal property on certain trusts therein mentioned. S. Johnstone died in the lifetime of Ann Bealby. On the 12th June, 1850, Ann Bealby died without ever having had any child, and without having altered or revoked her will; and the payment of the legacies and the purchase of the annuities directed by the will and codicil of R. Driffield to be made and completed after the death of Ann Bealby was, after her death, on the 1st January, 1851, duly made and completed, and the value of the household furniture, plate, linen and china, and of all the residue and remainder of the personal estate and effects of R. Driffield, after the payment of the said legacies and purchase of the said annuities had been so made and completed, amounted to 7487*l.* 12*s.* 1*d.* The debts and testamentary and funeral expences of V. Bealby, and the legacies and bequests by him given and bequeathed, and all the sums by his will directed to be paid, before and after the death of Ann Bealby, were paid by J. Munby and S. Spencer, as such executors of V. Bealby, with and out of the personal estate of V. Bealby other than and different from the personal estate which he was entitled to under the will of R. Driffield. S. Johnstone in his lifetime did not, nor until the execution by them of the disclaimer hereinafter mentioned, did J. Munby and S. Spencer, or either of them, ever in any wise do any act, except as herein stated, shewing their assent to or dissent from the bequest of R. Driffield of the residue of his personal estate to V. Bealby, so by the codicil bequeathed as aforesaid,

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and ever since and from the death of Ann Bealby until the execution of the disclaimer hereinafter mentioned, and from thence continually until the exhibiting the said information, the said personal estate has continued to be in the hands and possession of B. Hague, J. Swann and J. Munby, and the proceeds thereof have been applied by them in accordance with the directions and requisitions of the respective wills of R. Driffield and Ann Bealby; and B. Hague, J. Swann and J. Munby have at all times retained the said personal estate for the benefit of the several persons entitled thereto under the said respective wills. More than two years after the death of Ann Bealby, S. Spencer and J. Munby, having before then been applied to and requested by the Commissioners of Inland Revenue to pay the legacy duty on the said sum of 7487*l.* 12*s.* 1*d.* arising from the personal estate bequeathed by R. Driffield to V. Bealby, by a certain writing signed by them respectively, after reciting that R. Driffield, by the codicil to his will, gave and bequeathed all his household furniture, plate, linen and china, with all the residue and remainder of his personal property of what nature or kind soever, to his son in law V. Bealby, professed to disclaim and renounce the bequest so made by R. Driffield to V. Bealby.—The special verdict then found that the legacy duty was 10*l.* per cent., and amounted to 748*l.* 15*s.* 2*d.*; and that J. Munby, as executor of V. Bealby, was requested to pay it, but refused to do so.

Sir *F. Kelly* (*Pigott* with him), for the Crown.—The question is, whether the Crown is entitled to legacy duty on the sum of 7487*l.* 12*s.* 1*d.* R. Driffield, who died in 1816, bequeathed that sum to his daughter, the wife of V. Bealby, for life, and in the event of her death without issue to V. Bealby absolutely. V. Bealby by his will bequeathed

his reversionary interest in it, together with other personal estate, to such person as his wife should appoint, and in default of appointment to her personal representatives. She survived him and died in 1850 without having made any appointment; whereby his executors became entitled to this sum in trust for the representatives of his wife. No doubt, legacy duty would attach upon the bequest by R. Driffield to V. Bealby, but the executors of the latter have executed an instrument which they contend is a disclaimer of the legacy, and that consequently it never vested in their testator, but passed to his wife. It is not competent, however, for the executors of V. Bealby to disclaim the legacy after their testator has accepted and bequeathed it by his will. There is no direct authority on the subject. [*Martin, B.*—There are cases to this effect, that where an estate has once vested, it cannot be got rid of by disclaimer, but there must be a conveyance.] There are also cases which shew that an executor cannot take upon himself the execution of part of a will and disclaim the rest. Suppose V. Bealby, instead of leaving this legacy to his wife, had left it to a stranger, could his executors have defeated the gift by executing a deed of disclaimer? The defendant must contend that the executors might, by disclaiming, take away the legacy from any person to whom V. Bealby bequeathed it and remit it to the estate of R. Driffield, so as to cause him to have died intestate as to that sum. These considerations shew that the instrument called a disclaimer had no legal effect. Moreover, V. Bealby by his will charges this legacy with payment of his debts. Suppose that at the time of the alleged disclaimer he owed 7000*l.*, might not the creditor enforce payment out of the legacy? If the executors have power to disclaim, they might defeat the right of a creditor as well as the legatee. From the

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year 1845 the trustees have held the money on the trusts of the will of R. Driffield, one of which was that, on the death of his daughter without issue, the money should be held on trust for V. Bealby or his personal representatives. The duty is claimed under the 55 Geo. 3, c. 184, Sched. Pt. 3, Legacies, and the 36 Geo. 3, c. 52, s. 13.

The Court then called on

*Hugh Hill*, for the defendant.—The 36 Geo. 3, c. 52, s. 13, might afford ground for a claim against the defendant as a trustee under R. Driffield's will; but he is not liable under this information as executor of V. Bealby's will. By the 6th section of that Act, if an executor retains a legacy for the benefit of himself or any other person, the legacy duty is the debt of the executor; but if he pays the legacy to the person entitled to it, the legacy duty becomes the debt both of the executor and the legatee. The defendant is charged because there has been an actual payment to V. Bealby, or to the defendant as representing him, and because, if V. Bealby had been alive and had received the legacy, he would have been liable to pay the duty. But the facts stated in the special verdict shew that there has been no payment to the defendant *as executor of V. Bealby*. [*Martin, B.*—Three persons are entitled to the legal interest in the chattel, and one of them, as executor, is in equitable possession of the chattel and beneficially interested: surely he may be treated as in possession of the chattel one way or another.] It is found by the special verdict that the property actually came into the possession of the defendant and the two other persons as trustees of the will of R. Driffield, and so continued in their possession until the filing of the information. Consistently with that, the defendant may have had nothing more than a joint controul with them. It is sought to

charge the defendant, because he, as executor of V. Bealby, has received this legacy; but the special verdict finds that the trustees under R. Driffield's will still retain it. [*Martin*, B.—The defendant is charged by reason of his testator having dealt with a legacy bequeathed to him by R. Driffield.] Suppose the trustees had incurred costs in the execution of their trust, would they be entitled to retain them as against the executor? According to the allegations in the special verdict they might, and would only be bound to pay over the balance. It is conceded that where an interest has once vested it cannot be disclaimed. But in this case V. Bealby had a mere contingent interest in the legacy. His interest might have been defeated by his wife having issue or making an appointment. Therefore, nothing vested in him prior to his wife's death. [*Martin* B.—In one sense that is so, but in another it is evident that the interest did vest, for V. Bealby devised it and intended to take every benefit which could arise from it.] There is difficulty in saying that it was not such an interest as would be disposable by will, and there are authorities that an executor cannot defeat the will of his testator; therefore the only point is whether the facts found in the special verdict support the information. [*Martin*, B.—In effect they prove it.]

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Per CURIAM (a).—There must be judgment for the Crown.

Judgment for the Crown (b).

(a) *Pollock*, C. B., *Alderson*, B., and *Martin*, B.

(b) Decided in Hilary Term (Jan. 30), 1856.

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June 10.

## THE ATTORNEY GENERAL v. SHIELD.

By a marriage settlement, executed in 1807, certain lands were conveyed, subject to "an annuity or clear yearly sum of 100*l.*, freed and clear and without any deduction or abatement whatsoever in respect of any taxes or impositions then already or which should thereafter be taxed, charged, assessed or imposed upon the said premises, or upon the said annuity by authority of parliament or otherwise howsoever."—*Held*, that the parties paying the annuity were entitled to deduct income tax under the 5 & 6 Vict. c. 35, ss. 103, 73, and that the annuitant, refusing to permit the deduction, was liable to the penalty under section 103.

**T**HIS was an information for penalties against an annuitant, for refusing to permit the party liable to the payment of the annuity, which was charged upon lands, to deduct the income tax from two several half-yearly payments thereof.

Plea.—Not guilty.

At the trial before *Martin*, B., at the Middlesex sittings after last Easter Term, it appeared that the defendant, who was the widow of one R. Shield, was entitled to an annuity of 100*l.* under a marriage settlement executed in 1807, by which certain freehold tenements were conveyed to trustees upon trust, to take out of the rents "an annuity or clear yearly sum of 100*l.*," to be paid to the trustees quarterly, "freed and clear and without any deduction or abatement whatsoever in respect of any taxes, charges, rates, assessments or impositions then already, or which should thereafter be taxed, charged, rated, assessed, or imposed upon the said premises or any part thereof, or upon the said annuity or yearly sum of 100*l.* or any part thereof, by authority of parliament or otherwise howsoever, or for or in respect of any other matter, cause or thing whatsoever." One Burrell who had purchased the property, subject to this annuity, tendered the amount of two quarterly payments thereof, less income tax, to the defendant. She refused to permit the income tax to be deducted, and afterwards distrained for the whole amount upon the tenants.

Upon this evidence the learned Judge directed a verdict for the Crown for two penalties, leave being reserved to the defendant to move to enter a verdict for her.

*Collier* having obtained a rule nisi accordingly,

*Wilde* and *Beavan* now shewed cause.—The duty here charged is payable under the provisions of the 5 & 6 Vict. c. 35, Schedule (A.). The income tax on the whole of the land is in the first instance charged on and payable by the owner. Then section 60, No. IV., rule 10, provides that “Where any such lands, &c., are subject or liable to the payment of any rent-charge, &c., or any annuity, &c., or other annual payment thereupon reserved or charged, the landlord, owner, or proprietor by whom any deduction shall have been allowed as aforesaid, and the owner or proprietor being also occupier and charged to the said duties, shall deduct and retain out of every such rent-charge, annuity, &c., so much of the said duties or payments on account of the same (the just proportion of the sums allowed by the Commissioners in the cases authorized by this Act being first deducted) as a like rate of 7*d.* for every 20*s.* of such rent-charge, annuity, &c., shall by a just proportion amount unto”(a). The penalty of 50*l.* for refusing to allow the deduction is imposed by section 103; and that section further provides, that “All contracts, covenants and agreements made or entered into, or to be made or entered into, for payment of any interest, rent or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void.” The 73rd section of the same Act seems to make express provision for such a case as the present(b).

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*Watkin Williams*, in the absence of *Collier*, argued in support of the rule.—The defendant has not incurred the penalty, because, in refusing to accept less than the full sum of 25*l.* for each quarter, she has not refused to allow

(a) And see 16 & 17 Vict. c. 34. s. 40.

(b) See, however, as to section 73, *In re Knight*, 1 Exch. 802.

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a deduction of the income tax. The object of the settlor was to grant to the defendant 100*l.* a year clear of any deduction, and for that purpose the settlement secures to the defendant an annuity varying in amount, that is to say, 100*l.* a year, plus the amount of taxes at any time chargeable upon it. So that if the income and other taxes should at any time be 10*l.* a year, the annuity would then be 110*l.* [*Martin, B.*—Would not that be bad as a rent? *Pollock, C. B.*—We have nothing to do with the intention of the settlor. The Acts imposing the tax break through all private arrangements.]

Per CURIAM.—The rule must be discharged.

Rule discharged (*a*).

(*a*) *Collier*, on the 12th of June, applied to the Court to allow the rule to be re-opened, and the case stood over, but he ultimately abandoned his intention of further arguing the matter.

Nov. 25.

JONES v. SIMPSON.

THE defendant being indebted to the plaintiff on a bill for 25*l.*, accepted by him for the accommodation of one B., was served with a writ of summons on the 23rd of July, and judgment was signed on the 31st for 29*l.* 15*s.* debt and costs. On the 24th the defendant petitioned the Court of Bankruptcy for protection, under the 211th section of the Bankrupt Law Consolidation Act, 1849; and in the account of his debts, filed under the 214th section, on the 17th of August, inserted the plaintiff as a creditor for the bill, saying nothing as to the consideration or as to the costs. His proposal for the compromise of his debts was duly assented to at two private sittings by majorities consisting of 3-5ths of his creditors, who had proved debts amounting to 10*l.* The Court approved and confirmed the proposal, and granted to the defendant a certificate of the filing and entering of record of such approval, &c., and endorsed on such certificate a *protection from arrest*, under the 216th section, until 25th of March, 1859. The defendant's goods having been seized under a *f. fa.* in the action at the suit of the plaintiff, and a Judge at Chambers having set aside the execution: on motion to set aside this order, on the grounds; first, that the defendant's property was not protected by the order under section 216; secondly, that the protection was void against the plaintiff, on the ground that his debt was not truly specified; thirdly, that the order should not have been to set aside the execution, but simply that the sheriff should withdraw:—*Held*, that the defendant's property was protected, and that the order was rightly made.

on the 23rd of July, and judgment signed on the 31st for the sum of 25*l*. 15*s*. and 4*l*. costs, making together 29*l*. 15*s*. On the 24th of July the defendant filed a petition in the Court of Bankruptcy for the Birmingham district, under the 211th section of the Bankrupt Law Consolidation Act, 1849, praying that his person and property might be protected from process until further order; whereupon the Court granted such protection till the 25th of August. On the 17th of August the defendant filed an account and statement of his debts, and the consideration thereof, and the names, &c. of his creditors, and a full account of his estate and effects, and a proposal for the future payment or compromise of his debts, in pursuance of the 214th section. The plaintiff's name appeared as a creditor in the account as follows:—

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| No. | Names, residence and occupation of creditors. | Amount. | When contracted. | Nature and consideration of the debt and securities, if any, and estimated value of such securities.                               |
|-----|-----------------------------------------------|---------|------------------|------------------------------------------------------------------------------------------------------------------------------------|
| 23  | Jones,<br>Grocer, Walsall.                    | £35.    |                  | As holder of a bill drawn by Abraham Baxter, tailor, Ashted, Birmingham, and accepted by me, dated 30th of October, 1858, for £35. |

At the first private sitting, on the 25th of August, the defendant's offer of compromise was assented to by a majority of creditors, consisting of more than three-fifths in number and value of the creditors present who had proved debts to the amount of 10*l*., as provided for by the 215th section. The 25th of September was appointed for the second private sitting, and the protection to the defendant's person and property was renewed till that time, under section 211. At the second sitting, a majority, consisting of more than three-fifths in number and value of the creditors

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who had proved debts to the amount of 10*l.*, agreed to accept the defendant's proposal, which was to pay 7*s.* 6*d.* in the pound, payable by instalments secured by promissory notes at three, six and nine months, the last mentioned note to be the joint note of the defendant and one Watson. The resolution or agreement was reduced into writing and confirmed by the Court; and the Commissioner granted to the defendant a certificate of the filing and entering of record of such approval and confirmation, and endorsed on the certificate *a protection from arrest* till the 25th of March, 1859. It was admitted that the proper notices had been duly served, and that the defendant had sent to the plaintiff three promissory notes, each being for the payment of 3*l.* 2*s.* 6*d.*, payable at three, six and nine months respectively, which notes had not been returned. On the 6th of November execution issued for the sum of 31*l.* 3*s.*, and on the 8th of November the defendant's goods were seized under a *fi. fa.* The plaintiff alleged that the first intimation he had that the bill had been accepted for the accommodation of Baxter was by the defendant's affidavit.

On affidavits of these facts, *Martin, B.*, at Chambers, made an order setting aside the execution.

*Griffiths* moved to set aside this order (*a*).—The first question is, whether, under the 216th section of the Bankrupt Law Consolidation Act, 1849, the property of the debtor is protected. Section 211 expressly empowers the Court to grant a protection extending to the property as well as the person of the debtor. But the protection under that section was not renewed after the 25th of September. The 216th section merely enables the Court to endorse on the certificate "a protection from arrest." It provides that the petitioner "shall be free from

(*a*) Nov. 24. Before *Pollock, C. B., Watson, B., and Channell, B.*

arrest," and that any "officer arresting such petitioner" shall be liable to a penalty. In *Blackford v. Hill* (a) it was held that a certificate under the 7 & 8 Vict. c. 70, ss. 5, 6, was merely a protection from arrest, and could not be pleaded in bar of an action till the agreement should have been carried into effect and the case brought within the 12th and 13th sections of that Act. Under the Act now in question there is no protection to the petitioner's property unless it is vested in the assignee, as provided for by the 213th and 218th sections, until a certificate has been obtained under the 221st section.—Secondly, the protection is rendered invalid against the plaintiff by section 214, inasmuch as the plaintiff's debt is not truly specified in the account filed. The consideration of the bill is incorrectly stated: it should have appeared that it was given without consideration and for the accommodation of Baxter. The debt was a judgment debt at the time when the account was filed, and should have been so described; and the amount is untruly stated, no mention being made of the costs, which ought to have been inserted: *Southgate v. Saunders* (b).—Thirdly. Assuming the debtor's person and property to be protected, the order should merely have commanded the sheriff to withdraw, because the protection is only granted till the 25th of March.

*Cur. adv. vult.*

POLLOCK, C. B., now said.—We concur with my brother *Martin* in thinking that the protection prevented the execution of the writ, and that a writ which cannot be executed ought not to be issued. There will therefore be no rule.

Rule refused.

(a) 15 Q. B. 116.

(b) 5 Exch. 565.

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NEWSON v. SMYTHIES.

By indenture the plaintiff covenanted with the defendant to deliver up a farm on a certain day, and in the mean time to cultivate it on the four-course system, and that on the surrender he would deliver up an agreement to be cancelled, and would surrender all his unexpired term and interest in the farm, and if the defendant required he would at any time afterwards execute any deed for further assurance. And the defendant covenanted, that if the plaintiff did deliver up the farm, and in the mean time cultivate the farm on the four-course system, and perform and keep all and singular other covenants, the defendant would upon the delivering up of the farm pay for the manure, &c. :—*Held*, that the delivering up of the agreement was not a condition precedent to the plaintiff's right to sue on the covenant to pay for the manure.

**DECLARATION**—That by indenture, made between the plaintiff and the defendant, sealed with the seals of the plaintiff and the defendant, the plaintiff covenanted with the defendant that he, the plaintiff, would, on the 25th of March, 1857, quit and deliver up to the defendant specified parts of certain farms, and would, on the 29th of September, 1857, quit and deliver up to the defendant the residue of the several farms, and that in the mean time the plaintiff would cultivate the farms upon the four-course system, &c. And further, that upon delivery up of the residue of the several farms on the 29th of September, the plaintiff should surrender and yield up a certain agreement, in the indenture mentioned, to be cancelled; and would surrender and yield up all his unexpired term in the several farms, &c.; and, if the defendant should so require, the plaintiff should and would, at the expense of the defendant, at any time afterwards, execute any further act or deed for the more effectual and absolute surrender of the residue of such unexpired term and interest in the said farms. And the defendant did thereby covenant that, if the plaintiff did and should, on the 25th, quit and deliver up to the defendant the parts of the farms mentioned in the schedule, and did and should, on the 29th of September, quit and deliver up the peaceable possession of the residue of the several farms, and in the mean time cultivate the farms upon the four-course system, &c., and did and should well and truly observe, perform and keep all and singular other the

pay for the manure, &c. :—*Held*, that the delivering up of the agreement was not a condition precedent to the plaintiff's right to sue on the covenant to pay for the manure.

covenants and agreements thereinbefore contained, and on his part to be performed, he the defendant should and would, upon the delivery up of the possession of the residue of the said farms, lands and hereditaments to him upon the 29th day of September, so farmed, cultivated and managed as aforesaid, and on such performance of such other covenants as aforesaid, pay or cause to be paid to the plaintiff for the manure, tillages, hay, clover, &c., usually paid for as between an outgoing and incoming tenant, such sum as the same should be said to be worth by the valuation of two persons, &c.—Averment: that, though the plaintiff did quit and deliver up possession of the several farms in the parts, at the time and in the manner in the indenture covenanted, and did perform all other things by the said indenture on his part covenanted to be performed, and although the manure, tillages, hay, clover, &c., upon the said farms when the same were delivered up as are usually paid for between an outgoing and an incoming tenant were valued to be worth a large sum of money, &c.; and, although the plaintiff had done all things necessary, &c., and a reasonable time had elapsed, &c., yet the defendant had not paid the said sum or any part thereof, &c.

Plea.—That the plaintiff did not surrender and yield up the said agreement in the said indenture mentioned as covenanted by the plaintiff.

Demurrer and joinder therein.

*Henry Mills*, in support of the demurrer.—The consideration for the defendant's covenant is not entire and indivisible. The plaintiff's covenant to deliver up the agreement does not go to the whole consideration; therefore, according to the authorities collected in the note to *Pordage v. Cole* (a), the non-performance of it does not bar the action.

*Hannen*, for the defendant.—Whether the performance

(a) 1 Wms. Saund. 319 A, 320 c.

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of a covenant by one party constitutes a condition precedent to the right to enforce the performance of a covenant on the part of the other, must in every case depend on the intention of the parties to be collected from the whole instrument. In *Stavers v. Curling (a)*, the defendant covenanted to proceed to a fishery and procure a cargo consisting of sperm oil in as great a proportion as possible, to deliver the cargo in London, to obey orders, to be frugal of provisions, &c., and not to smuggle or trade; and the defendants covenanted, on performance of the before mentioned conditions on the part of the plaintiff to pay him a certain proportion of the net proceeds of the cargo. *Tindal*, C. J., pointed out that if the matter were *res integra* the argument would be strong, that the words "on performance of the before mentioned terms and condition on the part of the plaintiff" would shew that the intention was to make the performance by the plaintiff a condition precedent. The rule acted on in that case does not apply where the plaintiff covenants to perform a specific act on a particular day, and the defendant's covenant is to do something on the performance of that act. [*Bramwell*, B.—It may be that by the word "if" the parties intended to make the performance of the plaintiff's covenant a condition precedent. He referred to *Grey v. Friar (b)*.]

*H. Mills*, in reply.—Unless the covenants are treated as independent the plaintiff may get nothing, because he may fail in the performance of the covenant to give up possession of the agreement, by reason of its performance having become impossible: *Grimman v. Legge (c)*.

POLLOCK, C. B.—The plaintiff is entitled to our judgment. The decision of this case must turn upon the ob-

(a) 3 Bing. N. C. 355.

(b) 4 H. L. 565.

(c) 8 B. & C. 324.

vious intention of the parties rather than upon any strict construction of the language used. In *Boone v. Eyre* (a) and *Pordage v. Cole* (b), there was nothing in the language to prevent the acts to be done by the plaintiffs from being treated as conditions precedent. But common sense and justice dictated the decision in those cases. It is a general rule that covenants are to be treated as independent rather than as conditions precedent, especially where some benefit has been derived by the covenantor.

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BRAMWELL, B.—I am of the same opinion, though not without some doubt. The expressions “if the plaintiff did and should on the 25th quit, &c. ; and did and should well and truly observe, perform and keep all and singular other the covenants and agreements thereinbefore contained,” *prima facie* make the covenant of the defendant contingent on the performance of the plaintiff’s covenants. I say, with *Tindal*, C. J., if this matter were *res integra* I should doubt. But *Boone v. Eyre* (a) has established a principle which is fatal to Mr. *Hannen’s* argument. The defendant’s covenant appears to be made conditional upon the performance of *all* the covenants on the part of the plaintiff. But some of them, such as that for further assurance, are not to be performed till after the time of payment. Therefore it is impossible to construe the covenant literally. The reasonable construction is, that the plaintiff is entitled to recover for the manure ; and that the breach of his covenant is the subject of a cross action. I do not say that if possession of the farms had not been delivered up that the plaintiff could have sued. That is of the substance of the consideration. I had some doubt whether the surrender of this document was not equally so. But there is an independent covenant by the plaintiff to surrender up all his unexhausted term and interest, which has been performed.

(a) 1 H. Black. 273, note.

(b) 1 Saund. 319 h, 320 c.

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WATSON, B.—In cases of this kind we must look to the substance and real intention of the parties rather than to any particular expression. It is often difficult to say what covenants are conditions precedent and what are not; and it is well to adhere to the canons laid down by Mr. Serjeant *Williams* for determining the question. The delivery up of this piece of paper is immaterial and not of the substance of the consideration.

CHANNELL, B.—I think that the delivering up of this document is not of the essence of the consideration; and therefore the covenant to deliver it up is not a condition precedent unless expressly made so. *Boone v. Eyre* (a) seems to shew that the language of this deed is not sufficient for that purpose.

Judgment for the plaintiff.

(a) 1 H. Black. 273, note.

#### WILLIAMS v. FITZMAURICE.

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The plaintiff  
agreed to  
build a house  
for the de-

**DECLARATION.**—First count for work and labour and materials. Fifth count.—That the defendant agreed

defendant, who prepared a specification which contained particulars of the different portions of the work. Under the head "Carpenter and Joiner," there was specified the scantling of the joists for the different floors, the rafters, ridge and wall pieces, but no mention was made of the flooring. The specification stated that "the whole of the materials mentioned or otherwise in the foregoing particulars, necessary for the completion of the work, must be provided by the contractor." At the foot of the specification the plaintiff signed a memorandum, whereby he agreed with the defendant "to do all the works of every kind mentioned and contained in the foregoing particulars, according in every respect to the drawings furnished or to be furnished, for the sum of 1100*l*. The house to be completed and fit for the defendant's occupation by the 1st of August, 1858." The plaintiff prepared the flooring boards, brought them to the premises, and planed and fitted them to the several rooms, but refused to lay them down without extra payment, because the flooring was not mentioned in the specification, whereupon the defendant put an end to the contract, took possession of the works, and proceeding to complete the building used the flooring boards so prepared and fitted by the defendant:—*Held*, First, that the plaintiff was not entitled to recover for the flooring as an extra, because it was included in the contract though not mentioned in the specification. Secondly, that the plaintiff could not maintain trover for the flooring boards left on the premises by him and subsequently used by the defendant.

that he should employ the plaintiff, and that the plaintiff should do for the defendant certain work about building a house on land of the defendant, and provide materials for such work, for reward &c.—Averment: that plaintiff did all things necessary on his part to entitle him to be employed and permitted by the defendant to finish the said work and to sue the defendant in respect of the breach of the agreement hereinafter mentioned. Yet the defendant, after the plaintiff had commenced the work and whilst he was duly proceeding with the same, refused to employ the plaintiff to proceed with and finish the said work, and wrongfully dismissed him from his said employment, and would not permit him to further proceed with or finish the said work, and absolutely discharged him from so doing; whereby the plaintiff was deprived of the reward &c. Sixth count.—That defendant converted to his own use and deprived the plaintiff of his goods, to wit, scaffolding, planks, window frames and flooring boards.

Pleas (inter alia).—To the first count: Never indebted. To the fifth and sixth counts: Not guilty. To the fifth count: That the plaintiff wilfully and of his own accord, without the consent of the defendant, abandoned the said work in the said fifth count mentioned, and refused to complete the same, and wholly and absolutely relinquished and gave up the said agreement. To the sixth count: That the goods were not the goods of the plaintiff.

At the trial, before *Crowder, J.*, at the last Carnarvon Assizes, it appeared that the plaintiff, who was a joiner, in May, 1857, commenced building a house for the defendant. A specification having been prepared by the plaintiff, the defendant wrote to the plaintiff, saying "there are several matters that ought to have been much more detailed, but I trust entirely to your honourable feeling to complete them properly." On the 18th of August, 1857, the specification was signed. It was as follows:—

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"Specification and particulars of the several works and materials required in the erection of a building and house residence to be built in Cwbana Lane, near Conway, according to the plans and elevations and sections furnished by the Hon. Major Fitzmaurice. The necessary detail drawings to be furnished by the contractor. The house is to stand on the site pegged out, and on the foundations as they are now built."

Then followed in succession details for "bricklayers and masons," "foundations," "solid foundations," "mortar," "walling," "flues," "sinks," "steps," "slater and plasterer."

"Carpenter and joiner.

"All the timber to be yellow pine in this building of the best quality and free from knots.

"Scantling of timber.

|          |         |           |
|----------|---------|-----------|
| "Joists. | 1 floor | 9 × 2     |
|          | 2       | 8 × 2     |
|          | 3       | 6 × 2 &c. |

"The staircase in the tower is to be constructed four feet wide inside the steps from first floor to second floor, with full inch risers and  $1\frac{1}{2}$  inch tread, and the landing on strong and sufficient carriage, with moulded returned risings round the aforesaid landing, and strings to be 1 inch double sunk and beaded to receive the plaster ceiling. The balusters to be full inch deal, and every third step a rod of iron to be introduced to secure strength. The handrail to be a two and a half inch Honduras, moulded and sunk; handrail to be twisted to the sweep of the stairs &c. The other staircases in places to be three feet wide. All the doors on the first floor and second pair of floors to be two inch thick, and all the attics  $1\frac{1}{2}$  inch thick. The folding doors between the two drawing rooms to be 7 feet wide. All the windows to be of the best crown glass, and the windows of the dining and drawing room and all the rooms on the first floor to have  $1\frac{1}{2}$  inch thick deal frames, beaded and cut,

two panel shutters, moulded on one side, to be made to fold against the walls, with proper hinges and fastenings," &c.

After provisions as to "skirtings," and "plumber, glazier," and "bell-hanger," the agreement went on:—"The whole of the materials mentioned or otherwise in the foregoing particulars necessary for the completion of the work must in every respect be provided by the contractor, and must be all of the quality named," &c.

At the foot was written:—

"Memorandum of agreement.

"It is hereby agreed, this 18th day of August, 1857, between Major Fitzmaurice of the one part, and Owen Williams of the other part, that Owen Williams shall do and perform all the works of every kind mentioned and contained in the foregoing specification according in every respect to the drawings furnished or to be furnished, and subject to the above recited conditions, for the sum of 1100*l.*, &c.

"1100*l.* The house to be completed and dry and fit for Major Fitzmaurice's occupation by the first of August, 1858."

Then followed stipulations as to the times of payment.

The plaintiff proceeded with the building, and had received about 600*l.* on account, and an advance of 120*l.* on his promissory note, up to the 20th of February, when he wrote the following letter to the defendant:—

"Conway, Feb. 20, 1858.

"I am unable to proceed with your building for want of the floors being put down, which are not part of my contract. If you wish me to put them down, I will do so on having an order from you to that effect. Unless they are put down immediately I will not be able to complete my contract by the time fixed, and if they are not down within four days from this time I shall conclude that you

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do not intend for me to go on with my contract, and I will measure the work that I have done, so as to be paid for that only.

“Owen Williams.”

The defendant wrote in answer as follows :—

“Conway, Feb. 20, 1858.

“Mr. Owen Williams,


“A letter of this day’s date from you has just been put into my hands, but I defy any one to understand your meaning. Be good enough to state whether I am to understand that you are not going to put in the floors, or whether you are not going to nail them down, plane, or fit them, or what it is that you do not intend to do.

“W. E. Fitzmaurice.”

The plaintiff continued to work till the 24th of February, when he and his men finally quitted the premises. At this time he had prepared, planed, and fitted for the different rooms about 4000 feet of flooring. These boards were left on the premises not nailed down in their places. There were also other boards in a field adjoining, which had not been fitted to any particular rooms. On the 3rd of March the defendant gave notice to the plaintiff that unless he immediately proceeded to carry on the works the defendant would employ workmen to finish the house himself; and accordingly, about a fortnight afterwards, he locked up the premises and excluded the plaintiff, and his own workmen proceeded to finish the house. He then took possession of certain scaffolding and tools of the plaintiff, and of the flooring boards on the premises and in the field.

The learned Judge held that the flooring was included in the contract, and therefore the defendant was entitled to a verdict on the second plea to the fifth count; and he directed a verdict for the plaintiff on the count in trover for 19*l.* 7*s.*, the value of the scaffolding and tools, and 14*l.* 19*s.* on the count for work and labour, with leave to move to increase

the verdict by such sum as the Court should think fit in respect of all or any part of the flooring boards left on the premises or in the field.

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*McIntyre*, in the present Term, obtained a rule calling on the defendant to shew cause why the verdict on the count for work and labour should not be increased to the whole sum claimed, on the ground that the flooring was not included in the contract; and why the verdict on the count in trover should not be increased by the sum of 59*l.*, on the ground that the defendant converted to his own use certain timber of the plaintiff.

*Welsby* and *Beavan* now shewed cause.—The main question in this case is whether the plaintiff was bound by the contract to put in the floors. He contracted that for 1100*l.* the house should be “completed dry and fit for occupation by the 1st of August, 1858.” It is clear that the house would not be complete or fit for occupation without floors. Though the specification sets forth many particulars as to the wood work, it must not be taken that the intention was that those things alone which were specified are to be provided, but that, while the specification directs that certain things shall be of the quality, dimensions and materials named, the flooring was to be of the ordinary character and such as would be reasonably sufficient for the house. The plaintiff’s own conduct shews that he understood that the floors were included in the contract, because, knowing there was no provision for extras, he prepared and fitted floors for the several rooms without communicating with the defendant, and it was not until after he found that he had received from the defendant more than was due to him that he disputed it.—Secondly, as to the boards left on the premises which had been fitted for the floors under the contract, they were appropriated by

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the contract and passed to the defendant: *Goss v. Quinton* (a).—Thirdly, the same principle applies to the materials prepared for the work and left in the adjoining field.

*McIntyre* and *Morgan Lloyd*, in support of the rule.—The defendant, by his letter of the 6th of July, admits that the specification did not contain all he wanted. It is headed "Specification of works and materials required" &c., and at the foot is the memorandum in which the plaintiff agreed "to perform all the works of every kind mentioned and contained in the foregoing particulars." [*Pollock*, C. B.—It is absurd to suppose that the flooring was to be an extra. *Channell*, B.—The specification contains this expression: "The whole of the materials mentioned or otherwise in the foregoing particulars necessary for the completion of the work must in every respect be provided by the contractor." The work could not be completed without floors.]—Secondly, until fixed the flooring boards did not become the property of the defendant. In *Goss v. Quinton* (a) there was an express appropriation of the goods by the consent of both parties. Here nothing would pass to the defendant except what is mentioned in the contract. In *Wood v. Rowcliffe* (b) a bill of sale assigned all the household goods and furniture of every description whatsoever in a certain house, more particularly mentioned and set forth in an inventory; and it was held that no goods passed under the bill of sale except those specified in the inventory.

*POLLOCK*, C. B.—From the course adopted at the trial, we have to decide as Judges on the meaning of the written contract, and as jurymen on the effect of the evidence. I

(a) 3 Man. & G. 825.

(b) 6 Exch. 407.

own that when the rule was moved, I had some doubt whether the specification was not to be regarded as the contract between the parties; but, upon the whole facts being disclosed, it appears to me that no person can entertain any reasonable doubt that it was intended that the plaintiff should provide the flooring as well as the other materials requisite for the building, and that it was merely by inadvertence that no mention of the flooring was made in the specification. That the plaintiff intended to do it is manifest by his providing the material, which he brought to the house ready to be put in its place as a flooring. Besides, it is clearly to be inferred from the language of the specification that the plaintiff was to do the flooring, for he was to provide the whole of the materials necessary for the completion of the work; and unless it can be supposed that a house is habitable without any flooring, it must be inferred that the flooring was to be supplied by him. In my opinion the flooring of a house cannot be considered an extra any more than the doors or windows. But at all events, the plaintiff's conduct is an answer to his claim, for without any communication with the defendant and without the flooring being mentioned in the specification, he brings the material and is ready to lay the flooring down. I think that he was bound to provide the flooring, and that he cannot add its price to the cost of the building. Therefore upon the count for work and labour the plaintiff has recovered all that he is entitled to recover, and the rule to increase the damages on that count must be discharged.

With respect to the count in trover, the learned Judge reserved leave to the plaintiff to increase the amount of damages by two sums, viz., the value of the flooring (supposing the plaintiff was not bound by his contract to provide it) which was prepared and fitted for and left in the house, and the value of the boards left in the adjoining

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field. I think that upon the count in trover the verdict ought to be increased by 9*l*., the value of the latter, but not by the value of the flooring left in the house, and that the other part of the rule ought to be discharged.

WATSON, B.—I am of the same opinion.

CHANNELL, B.—I am of the same opinion. The contract was that the *house* should be completed and fit for occupation by the 1st of August, 1858, not that the *works* therein before mentioned should be completed by that day. I think that, looking at the terms of the contract, it would not be reasonable to read it as if it excluded all work not specifically mentioned. The plaintiff contracted to do the entire work in the various characters of bricklayer, carpenter, plumber, &c., for the sum of 1,100*l*.; and it is not the less a contract to do the whole, because it is specified that certain parts of the building shall be constructed in a particular way. It was a contract for the erection of a house and though the flooring was not mentioned in express terms, it was necessarily implied. With regard to the count in trover, there is evidence for us, sitting as a jury, that the verdict ought to be increased by 9*l*.

Verdict for plaintiff on count in trover  
increased by 9*l*., and residue of rule  
discharged (a).

(a) See *Wood v. Bell*, 6 E. & B. 355.

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BROWN v. KIDGER, PRICE, BOSTOCK and KNIGHT.

Nov. 18.

**T**HE first count of the declaration stated that the plaintiff by his bill of exchange, now overdue, directed to the defendants under the name and style of the "Peggs Green Colliery Company," required the defendants under such name and style to pay to the plaintiff's order 260*L* 14*s*. one month after date: and the defendants then accepted the said bill but did not pay the same; and thereupon the same was returned to the plaintiff, who had previously negotiated the same, dishonoured, with the expences thereof, which the plaintiff was compelled to pay.—There were also counts for money lent and money paid.

The defendants Bostock and Knight pleaded to the first count: that they did not accept the bill. To the residue of the declaration: Never indebted.

An abstract of another plea was delivered, and on application for leave to plead several matters the learned Judge ordered that the defendants be at liberty to plead the above pleas, the plaintiff undertaking that the subject-matter of the other plea, of which an abstract was delivered, might (if necessary) be given in evidence under the first plea. The abstract was as follows:—That the bill was accepted by Kidger and Price as agents to the Peggs Green Colliery Company, in which the defendants Bostock and Knight were alleged to be partners, without the knowledge or consent of the defendants Bostock and Knight, for their own private purposes, and not for partnership purposes, and that the partnership never received any value for the same:

The defendants were partners for the purpose of working a coal mine. Two of them conducted the business of the colliery. The firm being in debt and two actions having been brought against them, the managing partners borrowed of the plaintiff, upon the credit of the firm, money for the purpose of settling these actions, and accepted in the name of the firm a bill of exchange drawn by him on them. The partnership deed contained a clause "that if any partner should for his own use, or for any other purpose than the immediate use of the partnership, draw, accept or indorse any bill of exchange in the name of the firm," the others might determine his interest in the partnership.—

*Held*, that the managing partners had authority to bind the partnership by borrowing the money and accepting the bill.

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that the plaintiff is suing as trustee for Kidger and Price with full notice of the premises.

At the trial, before the Lord Chief Baron, at the London Sittings after last Trinity Term, it appeared that, by articles of agreement under seal dated the 1st September, 1853, the four defendants, Kidger, Price, Knight and Bostock, agreed to carry on together, as copartners, the business of coal masters, for the purpose of working a coal mine, which had been demised to them, situate at Peggs Green in the county of Leicester. The partnership was to continue for twenty years from the 25th March, 1853. At a meeting of the partners, in October, 1856, it was resolved that Kidger and Price should conduct the business of the colliery, which they accordingly did. In 1857, two actions were brought against the partnership, one by the Midland Railway Company to recover 154*l.* 15*s.* 2*d.* for tonnage of coal carried from the colliery to Leicester, and the other by one Worswick to recover 91*l.* 19*s.* 1*d.* for the hire of trucks. Kidger and Price were unable to satisfy these claims, and Bostock and Knight refused to contribute. Kidger and Price applied to the plaintiff, who was the attorney employed by them to defend these actions, to advance the money; and they engaged that he should be repaid out of the first assets of the partnership which could be collected, and should have a bill of exchange accepted by them on behalf of the partnership. The plaintiff paid the debt and costs in both actions, and drew a bill of exchange, dated the 6th February, 1858, for payment of 264*l.* 14*s.* one month after date, which was accepted by Kidger and Price "pro Peggs Green Colliery Company." On the 25th January, Kidger and Price gave notice of a half-yearly meeting on the 2nd February, to provide funds to reimburse the advances they had made in carrying on the works of the Company. The meeting was held on that

day, when Kidger and Price reported "that since the last half-yearly meeting the Midland Railway Company had commenced an action at law to recover 154*l.* 15*s.* 2*d.* for tonnages due from the colliery, and that Mr. W. Worswick had also commenced an action at law to recover the sum of 91*l.* 19*s.* for rent or hire of trucks due from the colliery; and that notwithstanding the resources of the colliery did not enable them to meet these demands, Messrs. Kidger and Price, to avoid costs and expences, raised and paid these debts and the costs of the actions, to which Mr. T. Bostock contributed 37*l.* 11*s.* 10*d.* That by the accounts is shewn to be due to Messrs. Kidger and Price the sum of 410*l.* 12*s.* 10*d.*, in addition to which the sum of 261*l.* 19*s.* was due for rent at Michaelmas last, for which provision must be now made, either by an immediate contribution by the partners or by raising money by other means." The following resolution was entered in the minute book: "Resolved that a contribution by the parties in Peggs Green Colliery, in accordance with their respective shares therein, should be made within three months from this meeting, of 900*l.*, and that Messrs. Kidger and Price in the mean time raise, by temporary means, money to meet the necessities of the Company in carrying on the partnership undertaking." The partnership deed contained the following clause:—"That if any or either of the said partners shall for his own use, or any other purpose than the immediate use of the said partnership concern, draw, accept or indorse any bill or bills of exchange or promissory note or notes in the name of the firm, it shall be lawful for all or any of the others of them, at any time within fourteen days after the same shall come to their, his or her knowledge, to give to the party so acting notice in writing, by leaving the same at his or her last known place of abode, announcing a dissolution of the

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said copartnership so far as regards the interest of the said party for whom such notice shall be left, and thereupon the said copartnership, so far as regards the interest of such party therein, shall determine in the same manner as if the whole of the said term of twenty years had expired."

It was objected on behalf of the defendants, that Kidger and Price had no authority to borrow money or accept bills on behalf of the partnership. The learned Judge was of opinion that in case of pressure one partner might borrow money for the purpose of paying a partnership debt, and that the clause in this deed of partnership impliedly authorized the partners to accept bills for the use of the partnership; and he left it to the jury to say whether the money was lent on the credit of the partnership. The jury found a verdict for the plaintiff for 260*l.* 14*s.*, and leave was reserved to the defendants to move to enter a nonsuit.

*Macaulay*, in the present Term, obtained a rule nisi accordingly, on the ground that the case proved by the plaintiff established no liability on the part of the defendants Bostock and Knight for money lent or as acceptors of the bill of exchange; or why a new trial should not be had, on the ground that the learned Judge ought to have directed the jury that the evidence did not warrant the verdict.

*Lush* and *G. Denman* now shewed cause.—First, the plaintiff is entitled to recover either on the count for money lent or money paid. The money was bonâ fide obtained by the two managing partners for the purpose of paying a partnership debt, and which if not paid would have resulted in an execution against the partnership effects. Where there is a pressing claim, one partner may borrow money on the credit of the partnership. It is not like the case of a new loan, which increases the liabilities of the

firm; but it is the mere substitution of one creditor for another upon better terms. The argument must go to the extent that one partner could not advance his own money to pay a partnership debt.—Secondly, it is objected that one partner cannot pledge the credit of the firm by accepting bills in their name. That depends on the provisions of the partnership deed. The clause in the deed impliedly gives one partner authority to accept bills for the partnership, the only prohibition being against his accepting them for his own use.—Thirdly, it is said that the report of the 2nd February, 1858, negatives the fact that the money was lent on the credit of the firm; but the notice of the 25th January contains a distinct intimation that the money was lent by the two partners on the credit of the firm.—They referred to *Peel v. Thomas* (a).

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*Macaulay* (Bell with him), in support of the rule.—The right of one partner to bind his copartners depends on authority. But one partner has no implied authority to render the firm liable for money borrowed by him to pay the debt and costs of an action for a partnership debt. The only authority is in respect of money borrowed for the purposes of the partnership dealing: *Rothwell v. Humphreys* (b). *Hawtayne v. Bourne* (c) decided that the resident agent, appointed by the directors of a mining company to manage the mine, has no *implied* authority from the shareholders of the company to borrow money upon their credit in order to pay the arrears of wages due to the labourers in the mine, who have obtained warrants of distress upon the materials belonging to the mine for the satisfaction of such arrears—nor in any other case, however pressing. The same principle applies to an ordinary partnership. Much

(a) 15 C. B. 714.

(b) 1 Esp. 405.

(c) 7 M. & W. 595.

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less is there any implied authority in one partner to render the firm liable on bills of exchange; and this partnership deed gives no express authority. Moreover, by the resolution of the 2nd February, 1858, it was resolved that the partners should contribute 900*l.* within three months, according to their respective shares, and that in the mean time the two managing partners should raise, by temporary means, money to meet the necessities of the Company. That can only mean that the two partners were to borrow the money on their own responsibility.

BRAMWELL, B.—I am of opinion that the rule ought to be discharged. The first question is, whether the two partners had authority to borrow money for the purpose of paying the debts of the partnership; for, if not, the firm are not liable on the bill of exchange given for the money borrowed. I can see nothing in the constitution of this Company to induce me to suppose that it was not intended that the ordinary rule should apply; and the partnership deed does not negative the right of one partner to borrow money for partnership purposes. The remaining question is one of fact; viz. whether the money was lent on the security of the two partners, or of the firm. As to that the evidence is reconcilable, and it seems to me that the money was lent on the credit of the firm.

WATSON, B.—I am of the same opinion. There are two points: first, whether the managing partners had authority to borrow money on the credit of the firm: secondly, whether they had power to bind the partnership by accepting bills of exchange. Generally speaking, one partner has power to borrow money for the purpose of carrying on the partnership business. But it may be that the business is to be carried on with ready money only, and that there

is no authority in one partner to pledge the credit of the firm. Everything depends on the nature of the partnership. Here the partnership deed contains a clause which impliedly enables any of the partners to accept bills of exchange in the name of the firm, provided they do not in violation of their duty accept them for their own use, "or any other purpose than the immediate use of the partnership." What is "the immediate use of the partnership?" Suppose the outlay was so great that they could not meet it, and it was necessary to call all the partners together and get a contribution from each, it would not do for them to stop their works and close their business until the contribution was obtained; and a bill accepted for money borrowed to carry on the business would be a bill for the immediate use of the partnership. Then if one partner may accept a bill in the partnership name, a fortiori he may borrow money. Therefore, from this very clause I infer a power not only to accept bills but to borrow money for partnership purposes.—As to whether the verdict is against the evidence, I do not think that the documents are incompatible with the oral testimony. The resolution means that there are debts to be met, and we have to pay them.

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CHANNELL, B.—I am also of opinion that the rule ought to be discharged. The first question is whether the two partners had authority to bind the Company. I am of opinion that they had. I do not consider this a mining Company, as such a Company is usually understood, but I look upon it as a trading Company; and I think that there is nothing in the partnership deed to restrict the rights which the partners would have as ordinary trading partners. On the contrary, the clause referred to gives an implied authority to any partner to accept bills for partnership purposes. Still the question arises whether there was

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any evidence for the jury that the money was lent on the credit of the firm. I think there was.

POLLOCK, C. B.—With respect to the question of law, I agree with my learned brothers: the jury have disposed of the question of fact, and I am not dissatisfied with their verdict.

Rule discharged (a).

(a) See Collier on Partnership, p. 268, 2nd ed.; Bainbridge on Mines, p. 365, 369, 372, 2nd ed.

Nov. 23.

MACFARLANE v. GIANNACOPULO.

Where a party who has dealt with an agent, has by his conduct led the principal to believe that he looked to the agent alone for payment, and thereby induced the principal, after the debt has become due, either to pay the agent the amount or allow him to retain it out of the principal's money in his

**ACTION** for losses adjusted on a policy of marine insurance made by the defendant.—Plea: Never indebted. Upon which issue was joined.

At the trial, before the Assessor of the Court of Passage at Liverpool, it appeared that, in January, 1857, the plaintiff applied to an insurance broker, named Gallatti, to effect an insurance on his vessel, called the "Tadmor," and that Gallatti signed the policy in question on behalf of the defendant. The vessel was lost, and on the 18th May the plaintiff applied to Gallatti for a settlement, when he received from him a credit note. The usual course of hands, the party so acting cannot afterwards resort to the principal.

The plaintiff, the owner of a ship, applied to a broker to effect an insurance on it; the broker signed a policy on behalf of the defendant, an underwriter. The ship was lost, and the plaintiff having applied to the broker for payment received from him a credit note. It was usual to pay credit notes at a month from their date. Both at the time of signing the policy and of the adjustment, the broker had money of the defendant sufficient to pay the loss. Nearly three months after the credit note was given the broker stopped payment, when the plaintiff applied to the defendant for the amount of the loss.—*Held*, that there was no injury to the defendant by the conduct of the plaintiff which rendered it unjust to call on him for payment, and therefore the case did not fall within the above rule of law.

business at Liverpool is for the broker to send in a credit note to the assured, and for the underwriter or his broker to pay the assured. The credit notes are usually settled every month in account with the broker when the assured has a running account with him; when there is no running account the broker pays his credit note at the end of a month from its date. Here there was no such running account. Both at the time of signing the policy and of the adjustment Gallatti had in his hands money of the defendant sufficient to pay the plaintiff's claim. Gallatti, who was a witness, stated that the usage was for the broker to send such credit notes and to receive them back when payment was made; and that the assured never applied to the underwriter, but to the broker. On the 25th August Gallatti stopped payment, when the plaintiff applied to the defendant for the amount of the loss. It is usual for the brokers to keep the premiums in order to provide for any loss.

The defendant's counsel submitted that he was entitled to a verdict, the defendant having paid Gallatti under such circumstances as made it a payment on behalf of the plaintiff. The learned Assessor told the jury that if they thought the plaintiff had by his conduct led the defendant to believe that he looked to Gallatti alone for payment of the loss, and had thereby induced the defendant, after the payment of the loss had become due, either to pay to Gallatti the amount of such loss, or to allow Gallatti to retain in his hands, out of money owing by him to the defendant, enough to provide for such loss, they might find a verdict for the defendant. The jury having found for the defendant,

*Brett* obtained a rule nisi to set aside the verdict on the ground of misdirection; against which

*Leofric Temple* now shewed cause.—The direction of the

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learned Assessor was correct. The conduct of the plaintiff was such as to induce the defendant to believe that the plaintiff had given credit to the broker. At the time of the adjustment the broker had in his hands money of the defendant sufficient to pay the loss, and there was no running account between the plaintiff and the broker, so that the credit note ought to have been paid at the end of the month from its date. If the plaintiff had given notice to the defendant of the non-payment, he would not have allowed the money to remain in the broker's hands. The defendant is therefore prejudiced by the conduct of the plaintiff. The rule is thus stated by Lord *Ellenborough* in *Kymer v. Suwercropp* (a):—"A person selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought. \* \* \* If he lets the day of payment go by he may lead the principal into the supposition that he relies solely on the broker; and if in that case the price of the goods has been paid to the broker, on account of this deception the principal shall be discharged." With reference to that case, *Maule, J.*, in delivering the judgment of the Court in *Smyth v. Anderson* (b), said:—" *Kymer v. Suwercropp* is stated as if it established this—that in no case shall a transaction between broker and principal have the effect of barring the right of the seller to recover as against the principal, except payment according to the contract, that is to say payment *at* or *after* the time limited by the contract. It in truth decides nothing of the kind: it decides that the vendee is not discharged where there is no injustice done by holding him liable,—as where he has not paid honestly in pursuance of the contract; but it by no means decides that there are no circumstances that can occur, except payment at or after the day stipulated for by the

(a) 1 Camp. 109.

(b) 7 C. B. 21. 39.

contract, that shall operate in discharge of the principal's liability to the seller. It leaves the general question wholly untouched." The authorities on this subject are reviewed in *Heald v. Kenworthy (a)* by *Parke, B.*, who thus states the principle:—"If the conduct of the seller would make it unjust for him to call upon the buyer for the money; as for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal. It would be *unjust* for him to do so." Here it would be unjust to compel the defendant to pay, after the plaintiff by his conduct has induced the defendant to believe that he had trusted the broker.—He also referred to *Wyatt v. The Marquis of Hertford (b)*, and 2 Smith's Lead. Cas. 302.

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*Brett*, in support of the rule.—There is no evidence that the defendant was injured by the act or omission of the plaintiff. The defendant was bound to pay the losses, and it was incumbent on him to shew a payment or something equivalent to it. But there is nothing more than an account in his favour with his broker. It must not only appear that the defendant might be injured by the conduct of the plaintiff, but that he was in fact injured. The defendant, however, would have been in the same position if the plaintiff had never applied to the broker. *Kymer v. Suwercropp* is only an authority that the seller cannot recover against the principal where it would be *unjust* for him to do so. Here the plaintiff has merely taken a security from the broker, and has omitted to make that known to the defendant. The defendant must go further and shew

(a) 10 Exch. 739.

(b) 3 East, 147.



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that he was thereby injured. *Heald v. Kenworthy* (a) only decided that payment by the principal to the agent is not of itself a discharge. The observations of Lord *Ellenborough* in *Kymer v. Suwercropp* (b) apply only to cases where the state of account between the principal and agent have been altered by reason of the creditor having let the day of payment go by, and thereby induced the principal to believe that he relied solely on the agent. Here there is no more than the fact that the broker had money of the defendant's in his hands: there is nothing which amounts in point of law to payment.

POLLOCK, C. B.—I am of opinion that there ought to be a new trial, not because there was a misdirection in the proposition laid down by the learned Assessor, but because there was no evidence to support it. There was no money in the hands of the broker applicable and appointed to this particular loss. The contract was with the defendant and he was bound to pay. No doubt, the broker had some money in his hands, which, acting regularly, he might have applied in payment of this loss, but he did not do so. Then, as to the alleged custom, all that it amounts to is, that it is usual to apply to the broker and not to the underwriter: if anything more, it might be doubtful whether it would be good.

BRAMWELL, B.—I am of the same opinion. I agree with my lord that the direction was a good proposition, but the objection is that there was no evidence to support it. The defendant says that he has paid the plaintiff's claim. He does not pretend that he has actually paid any one, nor that any one has paid the plaintiff, nor that he and the plaintiff have met and settled accounts; but what

(a) 10 Exch. 739.

(b) 1 Camp. 109.

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he says is this,—“By reason of your failing to perform your duty, I have sustained a prejudice.” Then has he sustained a prejudice? I doubt that, but it is clear that the plaintiff never failed in any duty to the defendant. It is not the duty of a person to whom money is due to apply to any one other than the person who owes it. The fact of an application having been made to the broker, ought not to have led the principal to say: “Look to the broker.” The defence is: “You have done something whereby I have sustained an injury;” but the plaintiff has neither committed nor omitted any act which amounts to a breach of duty.

WATSON, B.—I am of the same opinion. I entertain great doubt whether a plea of payment would be a good defence, but, assuming that it would, what evidence is there to support it? There are three parties, the assured, the underwriter, and the broker: the action is brought to recover the loss insured by the policy; but no settlement of account took place. The account was perfectly open, and the broker was indebted in a certain sum to the defendant. The law is, that where a broker deals in his own name the creditor may nevertheless resort to the after discovered principal; but if the creditor by his conduct has caused the state of accounts between the principal and agent to be altered, his right is subject to the state of those accounts; for it would be unjust to call on the principal to pay, when the creditor has induced the principal to believe that he looked to the agent alone. But what is there of that in this case? It is said that the defendant is injured by the neglect of the plaintiff; but the case only amounts to this, that the defendant had some money in the broker's hands, which the latter might have applied in pay-

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ment of the losses if he thought fit. It seems to me that there was no evidence to support the verdict.

CHANNELL, B.—I agree that the rule ought to be absolute. As to whether there would be any defence under a plea of payment, I express no opinion. The direction of the learned Assessor was a good proposition; but I think that there ought to be a new trial on the ground that there was no evidence to support it. The direction assumes that there was a breach of duty by the plaintiff and an injury to the defendant. Even supposing there was a breach of duty by the plaintiff, there is no evidence of any injury to the defendant. The case might have been different if there had been distinct evidence of a custom for the assured to look to the broker in the first instance for payment, but there is no evidence of such a custom, even supposing that it would be good in law.

Rule absolute.

Nov. 25.

CURTIS v. MARCH.

The time appointed for the sitting of a Court must be understood as the mean time at the place where the Court sits, and not Greenwich time, unless it be so expressed.

THIS was an action of ejectment which was entered for trial before *Watson*, B., at the last Dorchester Assizes. The time appointed for the sitting of the Court was 10 o'clock A.M., and the learned Judge took his seat on the bench punctually at 10 by the clock in Court. The cause was then called on and the plaintiff's counsel commenced his address to the jury, but as the defendant was not present and no one appeared for him, the learned Judge directed a verdict for the plaintiff. The defendant's counsel then entered the Court and claimed to have the cause tried, on the ground that it had been disposed of before 10 o'clock.

At that time it wanted one minute and a half to 10 by the town clock. The clock in Court was regulated by Greenwich time, which was some minutes before the true time at Dorchester. The learned Judge having refused the application,

*Cole* had obtained a rule nisi for a new trial upon affidavits of the above facts, against which

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*Slade* and *Kingdon* shewed cause.—The sitting of the Court was properly regulated by Greenwich time. [*Pollock*, C. B.—When it is stated that a Court will sit at a particular hour, that is understood by all persons as the time at the place where the Court sits. We are as much bound to take judicial notice that a particular place lies east or west of Greenwich, and consequently has a different time from it, as we are to know the days of the year.] A Judge may appoint the sittings of the Court by Greenwich time. [*Pollock*, C. B.—No doubt; but that was not done in this case. Suppose a question arises as to whether a person died at 12 o'clock on a particular day, is that to be determined by the time of the place or Greenwich time?] The time to be observed at any place is determined by a resolution of the authorities or general course of the parties at that place. Greenwich time is observed at most places in England through which railways pass, and in some the clocks have two sets of hands, the one shewing Greenwich time the other the time of the place.

*H. T. Cole* appeared to support the rule, but was not called upon.

*POLLOCK*, C. B.—We are all of opinion that the defendant ought to have an opportunity of trying the cause. The rule will therefore be absolute without costs. It seems to me doubtful whether this application is in consequence

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of any mistake on the part of the defendant or his counse for it may be that the Dorchester town clock pointed to Dorchester time, although that in Court was regulated by Greenwich time, and that this circumstance was not generally known in Dorchester. I cannot assent to the argument that the town council of any place may by their resolution declare that Greenwich, or any other time, shall be the time of the place; for I cannot help seeing the consequences. The difference between Greenwich time and the real time at Carlisle is several minutes, and therefore if a town council might determine the time, they might make a man born on a different day from that on which he was really born. Or suppose that by act of parliament a person was bound to go out of office on a particular day, the town council by altering the time might put him out of office to-day instead of to-morrow. So, if a person is entitled to a bonus from an insurance office in the event of his living to a certain period, that must be decided, not by the town council adopting Greenwich time, but by the mean time of the place. Ten o'clock is 10 o'clock according to the time of the place, and the town council cannot say that it is not, but that it is 10 o'clock by Greenwich time. Neither can the time be altered by a railway company whose railway passes through the place, nor by any person who regulates the clock in the town-hall. A person hearing that the Court would sit at 10 o'clock would naturally understand that to mean 10 o'clock by the time of the place, unless the contrary was expressed. In this case, looking to the difference of time (of which we are bound to take judicial notice), the defendant was in Court before 10 o'clock.

Watson, B.—On the day when the cause was tried, I came into Court punctually at 10 by the clock in the Judges' room, which was set at Greenwich time. I pro-

ceeded at once with the business. A few minutes afterwards Mr. *Cole* came in and stated that it was not yet 10, but I did not hear whether he meant by the mean time of the place or by Greenwich time. That is now explained by the affidavits, from which it appears that two times are kept, the clock in the Court being regulated by Greenwich time.

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CHANNELL, B., concurred.

Rule absolute.

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WILLIAMS v. THE GREAT WESTERN RAILWAY COMPANY.

Nov. 12.

**T**HIS was an action for the value of a bull killed on the defendants' railway. The cause was tried before *Byles, J.*, at the last Worcester Assizes, when a verdict was found for the defendants on the first count, which charged a defect of fences, and for the plaintiff on the second count, which charged negligence on the part of the Company.

Where a public Company is a party to an action, the mere fact that one of the jurymen was a shareholder in the Company is no ground for granting a new trial.

*Pigott, Serjt.*, moved for a new trial (a), on the ground that one of the jurymen was a shareholder in the Company. [*Bramwell, B.*—Is there any authority for such an application?] The case falls within the general principle that a judge is disqualified from deciding a cause in which he is personally interested: *Dimes v. The Grand Junction Canal Company* (b). [*Bramwell, B.*—That principle does not apply here: a judge cannot be challenged, a jurymen may. The objection not having been taken at the time when it might have been cured, we ought not to grant a

(a) Nov. 4. Before *Pollock*, and *Channell, B.*  
C. B., *Bramwell, B., Watson, B.*, (b) 3 H. L. Cas. 759.

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new trial; otherwise any person suing a public company might lie by and take his chance of a verdict, and if it was against him apply for a new trial because one of the jurymen was a shareholder in the company.] At the time of the trial the plaintiff was not aware that the juror was interested. There is no opportunity of searching the register at the time the jury are struck. [*Bramwell, B.*—Assuming that a suitor has no means of knowing whether a jurymen is interested, still, if the jurymen has not conducted himself improperly, the suitor has sustained no damage. Here it does not appear that any injustice has been done.]

*Cur. adv. vult.*

POLLOCK, C. B., now said :—This was a motion for a new trial, on the ground of one of the jurymen being a shareholder in the railway Company, and consequently open to a challenge if the fact had been known. Generally speaking, where there is ground of challenge, but no objection is taken to a juror who might be challenged, that is certainly no reason for granting a new trial. We cannot say that there are no circumstances which would induce the Court to interfere. For instance, if there had been any arrangement to procure a shareholder to be on the jury, for the purpose of influencing the other jurymen, or if there had been any collusion, the Court might interfere. So, even in a case where there had been no previous arrangement, the Court might interfere if they perceived that injustice had been done. But here we cannot say that any injustice has been done, and we think that, in general, it may be laid down that the fact of a jurymen who is open to challenge having served on the jury is not *per se* a ground for disturbing the verdict. Therefore in this case there will be no rule.

Rule refused.

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COLMAN, PALMER and CLARK v. TRUEMAN and ROUSE.

Nov. 23.

**T**HIS was an action for an alleged breach of contract contained in a sale note dated the 10th June, 1857, signed by one Drake as broker, for the sale by the plaintiffs, his then undisclosed principals, to the defendants of 2810 bags of sugar, expected to arrive by a ship called "Indian Chief." The defendants pleaded non assumpserunt and fraud.

In an action for a breach of contract in not accepting goods, to which the defendant pleaded fraud, a Judge having made an order for the inspection of correspondence between the plaintiffs and the consignors of the goods and the plaintiffs and their broker, after the contract and alleged breach.—*Held*, that the order was properly made in the exercise of the discretion of the Judge.

On the 19th March last, an order was made by *Pollock*, C. B., under the 50th section of the Common Law Procedure Act, 1854, requiring the plaintiffs to answer on affidavit stating what documents they had in their possession or power relating to the matters in dispute. This application was supported by an affidavit of one of the defendants, which stated, in substance, that at the time of the contract Drake represented to him that all the sugar was native Madras sugar of the usual run of such sugar, and that the ship was to have sailed about the end of April, 1857. That on the 10th June, 1857, six sale notes for six several parcels of bags of sugar, forming in the whole 5294 bags, were sent to the defendants by Drake. Five of these contract notes were expressed to be for the sale of bags of native Madras sugar expected to arrive, with a stipulation that, should the quality prove inferior to fair average, an allowance should be made. The sixth, which was the contract note on which this action was brought, was expressed to be for the sale of bags of sugar expected to arrive, with a stipulation that, should the quality prove inferior to fair average native Madras, a fair allowance was to be made in the price. On the 25th October, 1857, the "Indian Chief" arrived in London, having sailed on the 5th June, 1857.



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That on her arrival Drake required the defendants to take the 2810 bags. That the contents of 2310 of those bags were what is commonly called "jaggerly cane," and not the article known in the market as "native Madras sugar," and which is an article which could not fairly or properly be sold as sugar at all. That the defendants' principal, with whom they had placed the 2810 bags of sugar, had on these grounds refused to accept them. That the 2310 bags were shipped as "jaggerly cane," as would appear by the ship's manifest, and were consigned to the plaintiffs by that description. That the deponent believes that at the time of the making of the contract the plaintiffs and their broker knew that the contents of the 2310 bags were not "native Madras sugar," and were "jaggerly cane," and that they had no reason to believe that the "Indian Chief" had sailed, or could sail, about the end of April. That the representations above stated were false and fraudulent; and that an inspection of the documents in the possession and power of the plaintiffs would shew that at the time these representations were made the plaintiffs knew that they were untrue. That deponent believes that there are in the possession or power of the plaintiffs bills of lading, invoices, copies of ship's manifest, correspondence between them and the consignors of the bags by the "Indian Chief," and correspondence between the plaintiffs and their broker Drake, and other documents relating to the matters in dispute, to the production of which the defendants are entitled for the purpose of discovery.

The learned Judge having made an order accordingly, the plaintiffs Colman and Palmer filed an affidavit stating that the only documents in their possession relating to the matters in dispute in this action were those of which a list was given under the following heads:—First, bills of lading. Secondly, letters from the consignors (a native Indian firm)

and invoices. Thirdly, letters to the consignors. Fourthly, correspondence with Drake, the broker, including letters to and from him and the plaintiffs, but all dated in January, 1858. The affidavit also stated that in the contract wherein the goods were described as "about 2810 bags sugar" it was expressly stipulated that, "should the quality prove inferior to fair average native Madras, a fair allowance to be made to the buyers, as also for any damaged:" the question of quality and allowance to be settled by Drake and the defendant Rouse. That on the arrival of the sugar it was inspected and allowances claimed by Rouse for inferiority of quality and damage, amounting to 690*l.*, which were assented to by Drake. That the deponents object to the production of any or either of the above mentioned documents—First, because they believe that the application is for the purpose of fishing out evidence in support of defences which are unjust, and which they believe to be groundless and a mere afterthought and not *bonâ fide*. Secondly, because such documents in no wise tend to prove or support either of the defences set up. Thirdly, because, after the settlement of the question of quality and allowance, it is not open to the defendants to set up those defences. Fourthly, because the said documents are not documents to the production of which the defendants are entitled for the purpose of discovery or otherwise. Fifthly, because they were not received, nor (with certain specified exceptions) written until after the contract was entered into. Sixthly, (as to certain of the documents) because they were not written until after the defendants claimed to repudiate the contract; and (as to those written by us) were written for our own protection in consequence of such repudiation; and (as to all) the contents are of a confidential nature, and they are in the

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nature of privileged communications. Seventhly, because they are not evidence against us in the present action.

On the 3rd August, *Erle*, J., made an order that the defendants be at liberty to inspect and take copies of the documents mentioned in the above affidavit.

*Crouch*, in the present Term, obtained a rule nisi to rescind or vary that order; against which

*Lush* and *Blackburn* now shewed cause.—The first objection is clearly untenable. If of any weight, it should have been urged against the original order, or as ground for rescinding it. The second objection is that the documents in no wise tend to prove the defences; but the defendants cannot be concluded by the mere statement of the plaintiffs. It is not denied that they relate to the matters in question, and where the documents are relevant it is not sufficient to say that they will not assist the defence: *Newton v. Berresford* (a), *Goodall v. Little* (b). The third objection cannot now be urged, since that matter is concluded by the original order. Fourthly, it is objected that these are not documents to the production of which the defendants are entitled for the purpose of discovery or otherwise: but that objection has also been disposed of by the original order. With respect to the fifth objection, it is no answer to say that the documents were written after the contract. Communications between the parties subsequent to a transaction may be most material. A similar objection was made in *Glyn v. Caulfeild* (c), but Lord *Truro*, C., said:—"With regard to the character of the papers, the objection to production upon the ground that they relate to the matters in dispute in the cause, and arose out

(a) 1 Younge, 377, 381.

(b) 1 Sim. N. S. 155, 161.

(c) 3 M'N. & G. 463.

of communications between the parties themselves with a view to their defence in the suit, is not supported either on principle or authority." As to the sixth objection, these documents are not in the nature of privileged communications. Letters between the parties and their solicitors subsequently to the institution of the suit are privileged, but not letters between the parties themselves: *Whitbread v. Gurney* (a), *Glyn v. Caulfeild* (b). As to the last objection, letters between the plaintiffs and their broker would clearly be evidence for the defendants.

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*Crouch*, in support of the rule.—The main contest is in respect of the production of the correspondence after the contract and alleged breach, and which can only assist the defendants' case by containing admissions. The argument on the other side amounts to this: that in every action for a breach of contract in not accepting goods, the defendant has a right to inspect all the correspondence in the plaintiff's possession up to the time when the order for inspection is granted. But it does not follow, because a defendant has a right to the production of documents at the trial, that therefore he is entitled to an inspection of them. In the former case the documents would be open to explanation, but upon inspection the defendants might select those only which benefit themselves and reject the others. In a Court of equity the plaintiffs would have an opportunity of putting in an answer, so that the production would be accompanied with an explanation of all the circumstances: *The Princess of Wales v. The Earl of Liverpool* (c). A Court of law will not, by compulsory production, deprive the plaintiffs of that protection which the practice in equity affords. It is a safe rule, of general application, not to

(a) 1 Younge, 541.

(b) 3 M'N. & G. 463.

(c) 1 Swanst. 123.

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compel a party to disclose correspondence which took place after the alleged breach of contract. If a bill in equity charges fraud *generally*, and alleges that the defendant has in his possession documents, papers and letters which, if produced, would shew the imputed fraud, the defendant has an opportunity by his answer of denying the fraud; and if he does so unequivocally the Court will not in general compel him to produce the documents, because a bill so framed is purely a fishing bill: Wigram on Discovery, p. 234, 2nd ed. The doctrine that a party is not upon a mere allegation of fraud entitled to the production of documents was recognised by Lord *Langdale*, M. R., in *Bassford v. Blakesley* (a). The power of a Court of equity to order the production of documents arose out of the jurisdiction to compel a discovery, and is restricted by the same rules: Daniel's Chan. Prac. p. 943, 3rd ed. The decision in *Curling v. Perring* (b) did not proceed on the ground that the correspondence was between the solicitor of the defendants and a person not a party to the suit; but that the correspondence, having taken place after the dispute which was the subject of litigation had arisen between the parties, formed no part of the plaintiff's title. In *Llewellyn v. Badeley* (c) Sir *J. Wigram*, V. C., after stating that his decision in that case did not conflict with *Whitbread v. Gurney* (d), *Storey v. Lord George Lennox* (e), or *Greenlaw v. King* (f), said:—"Those cases only decided that it is not every document which has come into existence since the dispute commenced, having reference to the dispute, that is necessarily privileged only because it might disclose the evidence to be given on the part of the defend-

(a) 6 Beav. 131.

(b) 2 Myl. & K. 380.

(c) 1 Hare, 527.

(d) 1 Younge, 541.

(e) 1 Keen, 341; S. C. 1 Myl. & Cr. 525.

(f) 1 Beav. 137.

ants. Undoubtedly there are many documents of which all this might be truly stated, and which, notwithstanding, would not be privileged. But I think such documents may be privileged without calling in aid the doctrine of professional confidence." If the right of inspection be carried to the length contended for, in no case of an alleged breach of contract could either party correspond with his agent abroad without the risk of being compelled to produce his correspondence. *Glynn v. Caulfeild* (a) and *Goodall v. Little* (b) do not apply, because in those cases there was no definite dispute until after the bill was filed.

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POLLOCK, C. B.—The rule must be discharged. It asks to set aside or vary the order of my brother *Erle* for the inspection of documents which the defendants admit are in their possession; and the question is, not whether my brother *Erle* had power to make the order, but whether he made it with due discretion with reference to the facts before him. I think that we ought not, either with reference to the facts or authorities, to set aside the order. Whether upon every occasion when fraud is charged whatever has passed between the parties must be produced, is a matter as to which we need lay down no rule. It certainly appears that statements by the parties to their solicitor, and the opinions of counsel, have in modern times been considered confidential. *Curling v. Perring* (c), which was a motion for the production of correspondence between the solicitor of the defendants and a person not a party to the suit, has no bearing on this case. It would be monstrous if an attorney could not write to a stranger for information respecting the suit without being liable to have his correspondence called for. The simple answer is, that he is an

(a) 3 M'N. & G. 463.

(b) 1 Sim. N. S. 155.

(c) 2 Myl. & K. 380.

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attorney and has acquired his knowledge of certain facts in that character. But certainly the correspondence amongst the parties themselves, or between them and their agent, has been ordered to be produced; and if there was no authority for it, I should be so disposed to act. In my opinion, there is no reasonable ground for any distinction between such correspondence before the contract and after the alleged breach of contract. It may be most material after the complaint is made, to see that it is honestly made in the language of a man who has committed no fraud, or whether, as alleged in this case, there was a wish to pass off an article called "jaggerly cane" for native Madras sugar. In equity, a defendant may obtain an inspection down to the time when his answer is filed, and there is no reason why the same rule should not apply here. I think that the order of my brother *Erle* was correct, and that we ought not to interfere to set it aside.

BRAMWELL, B.—I am also of opinion that the rule ought to be discharged. Assuming that my brother *Erle* had power to make the order, I cannot say that he has exercised an improper discretion.

WATSON, B.—I am of the same opinion. The defendants might have filed a bill in equity for a discovery, and this application is in lieu of it. The affidavits of the defendants state certain frauds by which it is alleged they were deceived, and all the evidence asked for is in support of that charge. The plaintiffs do not deny that the documents asked for are relevant to the subject in dispute, but Mr. *Crouch* says that in our discretion we ought not to confirm the order. I cannot, however, think that my brother *Erle* was wrong in making it. Looking at the documents, I can see that they are relevant and may be

most material for the defendants' case. It often happened that a party failed to support his case for want of an inspection of documents, and now a Court of law is empowered to do what formerly a Court of equity alone could have done. In my opinion, we ought not, either with reference to the decisions in equity or the circumstances of the case, to set aside the order. If the plaintiffs have committed a fraud, and have written on the subject amongst themselves or to their agents, there is no reason why the correspondence should not be produced. My judgment proceeds on this ground, that my brother *Erle* has properly exercised his discretion.

Rule discharged.

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WALTON and Others v. BROWN.

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*FIELD*, on behalf of the defendant, had obtained a rule calling on the plaintiffs to shew cause why the Master should not review his taxation and disallow the plaintiffs their costs, subsequent to the summons to stay upon payment of 3*l*. 11*s*. 2*d*., and tax and allow the defendant's costs subsequently on the higher scale; and why an order of *Erle*, J., ordering the plaintiffs' full costs to be taxed should not be rescinded.

It appeared from the affidavits on which the rule was obtained, that the writ issued on the 17th of June indorsed with a claim of 27*l*. 4*s*. 8*d*. The plaintiffs received from the defendant half a 10*l*. note on the 17th, and the other half subsequently.

On the 24th of June a summons was taken out to stay proceedings on payment of 3*l*. 11*s*. 2*d*., which was dismissed, the plaintiffs claiming more. The defendant then appeared,

Upon a summons to stay proceedings on payment of a certain sum and costs, if the plaintiff refuses to take the amount offered in discharge of his claim, but afterwards accepts it, there is no absolute rule which entitles the defendant to his costs incurred subsequently to the summons.

*Seemle*, that in such case if the defendant's answer to the plaintiff's claim consists partly of a set-off, the plaintiff is entitled to his

costs to the time of pleading, unless the defendant has offered to allow the set-off.



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and a declaration was delivered, to which the defendant pleaded on the 20th of July. The pleas were: First, as to 10*l.*, payment after action brought: Secondly, except as to the 10*l.* and 13*l.* 11*s.* 2*d.*, set-off: Thirdly, except as to 13*l.* 11*s.* 2*d.* and 10*l.*, never indebted. Lastly, as to 3*l.* 11*s.* 2*d.*, payment into Court. On the 4th of August the plaintiffs delivered their replication to the first and last pleas, admitting the payment and taking the money out of Court, but not replying to the other pleas. On taxation the Master allowed the plaintiffs their costs on the lower scale, up to the time of the payment of the money into Court, and allowed the defendant his costs from the time of the payment of money into Court. The plaintiffs not having replied to the other pleas, judgment of non pros was signed by the defendant on the 6th of August. The plaintiffs then took out a summons to set aside the judgment, and to shew cause why the Master should not tax their full costs, and the defendant took out a cross summons to shew cause why the Master should not disallow the plaintiffs' costs subsequent to the summons to stay, and tax the defendant his subsequent costs. The summonses were attended before *Erle, J.*, who made no order on the defendant's summons, but ordered that the Master should tax to the plaintiffs their full costs of the action, including the costs of that application; but that the order should not be acted upon till the 5th day of Term.

The plaintiffs now shewed cause upon an affidavit in which they stated that the defendant was, at the commencement of the suit, indebted to them in 27*l.* 4*s.* 11*d.*, less a set-off of 1*l.* 5*s.*: that after the pleas had been pleaded, 12*l.* 8*s.* 9*d.* only remained in dispute, and that inasmuch as the defendant had allowed several bills of exchange drawn by the plaintiffs and accepted by him for small amounts to be dishonoured, and fearing that they would be incurring large

costs which they should not be able to get from the defendant, they determined to abandon their claim to the 12*l.* 8*s.* 9*d.*, though they believed that they were justly entitled to the money.

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*Baylis* shewed cause (*a*).—First, by rule 22 of the Pleading Rules, Trin. T. 1853, the plaintiffs are entitled to their costs up to the time of pleading the plea of payment of 10*l.* after action brought. [*Bramwell*, B.—That rule does not apply. It must be construed as supposing there has been no summons to stay the proceedings.]—Secondly, the amount due to the defendant was reduced by the plea of set-off. If the sum tendered is only sufficient because the defendant has a set-off, a plaintiff is right in going on until the plea of set-off is pleaded. It does not appear that the set-off was mentioned when the summons to stay was attended; but that the 3*l.* 11*s.* 2*d.* was offered in satisfaction of the whole of the plaintiffs' claim. When the set-off was pleaded and the plaintiffs said, that if they were to have the benefit of the set-off they would accept the 3*l.* 11*s.* 2*d.*, they did not simply take what was before offered. Therefore the case does not fall within the rule: *Shaw v. Hughes* (*b*).—Thirdly, the affidavits shew that the plaintiffs declined to proceed from motives of prudence. Therefore, the plaintiffs having shewn that they had reasonable grounds for the course adopted, the defendant is not entitled to costs: *Watson v. Coleman* (*c*). [*Channell*, B., referred to *Cumming v. Columbine* (*d*). *Bramwell*, B.—I incline to think that, as a general rule, a plaintiff should get his costs to the time of pleading, in a case like the present, where there is a plea of set-off.]

(*a*) Nov. 9. Before *Pollock*,  
C. B., *Bramwell*, B., *Watson*, B.,  
and *Channell*, B.

(*b*) 15 C. B. 660.

(*c*) 7 Man. & G. 422.

(*d*) 6 Dowl. 373.

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*Field*, for the defendant, suggested that he could shew that the existence of the set-off was well known to the plaintiff at the time of the summons to stay on payment of 3*l.* 11*s.* 2*d.* [*Pollock*, C. B.—It will not do unless it is shewn that the set-off was mentioned.]

*Field* then applied for leave to file an additional affidavit in answer to that of the plaintiffs, under the 45th section of the Common Law Procedure Act, 1854. [*Pollock*, C. B.—Ought not the application to have been made on reading the affidavits, and before the plaintiffs' counsel had been heard at length?] The rule has been laid down, that leave to file additional affidavits will not be granted unless thought necessary on the argument.

Leave having been granted for that purpose, the defendant filed an affidavit which stated that, before this action was commenced, a person calling himself the accountant of the plaintiffs called upon him for payment of the plaintiffs' bill, which the defendant refused, as he was a stranger to him: that on two occasions the accountant stated that his expenses for journeys must be paid, when the defendant told him that he should not pay any portion of them, as the account would have been settled before if the plaintiffs had called and allowed the set-off of 1*l.* 5*s.*: that the defendant sent a person to pay the balance of account, less the sum of 12*l.* 8*s.* for the accountant's expenses and the set-off of 1*l.* 5*s.*; but the plaintiffs refused to settle on those terms.

*Field*, for the defendant.—The general rule is thus stated in Archbold's Practice, p. 1295, 9th ed.:—"In some cases, where the amount of the sum claimed is *disputed* and the defendant is ready to pay it, he may, at any time after the service of the writ, obtain a summons calling upon the

plaintiff to shew cause why, upon payment of a certain sum (namely the sum actually due) and costs, the proceedings in the action should not be stayed. If on attending before the Judge the plaintiff refuse to receive the amount mentioned in the summons, the Judge will indorse such refusal. If after this the plaintiff proceeds, and he recovers no more than the sum offered, he will in general not only have to bear his own costs incurred subsequently to the offer, but also have to pay the defendant's subsequent costs." The question is, whether the case is within that rule. The plaintiffs' conduct was vexatious in proceeding for the 12*l.* 8*s.* 9*d.* claimed for the accountant's expenses. [*Martin*, B.—There is no ground for making the plaintiffs pay the defendant's costs.] *Fletcher v. Tanner* (a) is an authority that the defendant is entitled to his costs subsequently to the summons to stay proceedings, on payment of 3*l.* 11*s.* 2*d.* [*Martin*, B.—The Master informs us that there is no absolute rule in these cases to give the defendant costs. *Channell*, B.—The acceptance of the sum originally refused is *prima facie* evidence of oppressive and vexatious conduct on the part of a plaintiff; but that may be rebutted.] In *Watson v. Coleman* (b) *Tindal*, C. J., said:—"I agree that the general rule is, that where a plaintiff, after a tender of a sum which he refuses to accept, goes on, and he recovers no more than the sum tendered, he shall pay the defendant the costs subsequently incurred. It is, however, open to the plaintiff to shew that he acted not oppressively and vexatiously, but under mistake, or that he had reasonable grounds for the course he adopted." The rule is thus stated in *Gray on Costs*, p. 307:—"If a defendant, instead of waiting to pay money into Court until after the plaintiff has declared, takes out a summons to stay proceedings on

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(a) 3 C. B. 963.

(b) 7 Man. &amp; G. 422.

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payment of a certain sum and costs, and the plaintiff then refuses to take it in discharge of his claim, but subsequently accepts it, the defendant is entitled to his costs incurred subsequent to the summons; for it is a general rule, that if the one party offers what the other afterwards takes, without getting more, the latter must pay the costs of the former and bear his own from the time of the offer." *James v. Raggett (a)* is an authority for that position. There is nothing in this case to except it from the general rule. No reason is assigned for the acceptance of the sum paid into Court which might not have existed at the time it was refused.

*Baylis* was heard with respect to the affidavit of the defendant, and submitted that it did not answer the case on the part of the plaintiff.

Per CURIAM.—The rule must be absolute to review the Master's taxation by disallowing the plaintiffs their costs subsequent to the tender, but not to give the defendant his costs.

Rule accordingly.

(a) 2 B. & Ald. 776.

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## MICHAELMAS VACATION, 22 VICT.

## IN THE EXCHEQUER CHAMBER.

*(Error from the Court of Exchequer.)*

Sir JOHN MORRIS, Bart., and LOCKWOOD v. THE RHYDY-  
DEFED COLLIERY COMPANY.

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Dec. 2.

THIS was an appeal from the judgment of the Court of Exchequer, discharging a rule to enter the verdict for the plaintiffs pursuant to leave reserved at the trial. The facts are stated in the report of the case, *antè*, p. 473.

An indenture of settlement contained a power for the tenant for life to lease for lives certain hereditaments to any person willing to build houses thereon. Also a power to lease for sixty-three

*Grove* (Pulling with him), for the plaintiffs (*a*).—First, the lease of the 1st January, 1840, is void, being in excess

years the coal mines under the lands "with all such powers, authorities, accommodations, liberties, and privileges as shall be necessary or are usually contained in leases of collieries or mines in the county, place, or neighbourhood where the collieries intended to be demised are or shall be situate, for seeking, winning, working, drawing, taking and carrying away the coals; so as the lessees be not made dispunishable for waste by any express words therein contained. In execution of this power the tenant for life granted a lease which contained a power for the lessee "to erect, build and construct, and set up in and upon the said mines, lands and premises, all such engine-houses, machine offices, counting-houses, warehouses, store-rooms, workshops, workmen's cottages, huts, &c., erections, buildings and accommodations as shall be *bonà fide* necessary or proper for or in the due prosecution and carrying on of the said works." There was also a power to dig and use stones, slate, brick earth and materials in any part of the land which should be required for the collieries or for any buildings thereby authorized to be made in the exercise of any power thereby granted. Ejectment having been brought to recover possession of the coal mines on the ground that the lease was not a due execution of the power, the jury found that a power to build cottages in places convenient with reference to the works was both necessary and usual in leases of collieries in the neighbourhood.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer): First, that the lease was not in excess of the power.—Secondly, that the lease was not void on the ground that the power to build was in violation of the provision in the settlement that the lessees should not be made dispunishable for waste.

(*a*) Before *Erle, J., Williams, J., Crompton, J., Crowder, J., and Willes, J.*

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of the power contained in the settlement of the 8th June, 1819. The true test is, first, whether the power in the lease is confined to such accommodations as are necessary or usual for working the coal; secondly, whether the power is confined to such accommodations as are necessary or usual for working collieries in the neighbourhood. Workmen's cottages are not necessary for seeking, winning and carrying away coal. Schools may in one sense be necessary, but they are not within the power contained in the settlement. Each leasing power has a separate term and a separate restriction. One applies to hereditaments then demised; another to hereditaments not then demised. There is a special power to grant building leases, but only to such persons as shall actually covenant to improve the hereditaments by erecting houses thereon, and to expend such sums in improvements as shall be an adequate consideration for the interest granted by the leases. The word "accommodations" in the settlement means such accommodations as are necessary for seeking, winning, working, drawing, taking and carrying away the coal, such as engine houses, sheds, &c. Part of the estate is adapted for building, and that is provided for by the building power; but if the lessees of the mines are entitled to build workmen's cottages on any part of the estate its value would be destroyed. The question whether a general power is restrained by a special power was considered in *The Earl of Cardigan v. Armitage* (a). The words "for seeking, winning, working, &c. the coals" have reference to the plant, that is such matters as are purchased by a new lessee, and do not extend to workmen's cottages. The words of the lease are inconsistent with the language of the settlement. *Wright v. Wakeford* (b), *Doe d. Mansfield v. Peach* (c), *Doe*

(a) 2 B. & C. 197.

(b) 4 Taunt. 213.

(c) 2 M. & Sel. 576.

d. *Bartlett v. Rendle* (a) and *Hawkins v. Kemp* (b) shew that a power must be strictly pursued. [*Williams, J.*, referred to *Vincent v. The Bishop of Sodor and Man* (c).] It will be argued that the lease is void for the excess only; but though a Court of equity might remodel the lease, at law it is altogether void: Sugden on Powers, vol. 2, p. 75, 7th ed.—Secondly, the lease in express terms enables the lessees to commit waste. There is a general power to dig stones in any part of the lands.

*Evans* (*Giffard* with him) appeared for the defendants, but was not called on to argue.

ERLE, J.—The question is, whether the lease of the 1st January, 1840, is a good execution of the power contained in the settlement of the 8th June, 1819. That is a power to lease the mines, “together with all such powers, authorities, accommodations, liberties and privileges as shall be necessary or are usually contained in leases of collieries or mines in the county, place or neighbourhood where the collieries or mines” in question are situate. Such is the power proposed to be exercised by the lease of 1840; and the questions are: first, what are the powers given by the lease; and, secondly, whether, in consequence of the finding of the jury, those powers are restricted. Now the powers given are these.—After the demise of the coal mines, there is a power for the lessee to “seek for, win, work, draw, take and carry away the coal.” Then comes a power to build “such engine houses, machine offices, counting houses, warehouses, store rooms, workshops, workmen’s cottages, stables, huts, hoods, hovels, sheds, bridges, walls, erections, buildings and accommodations as

(a) 3 M. &amp; Sel. 99.

(b) 3 East, 410.

(c) 5 Exch. 683.

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shall be bonâ fide necessary or proper for or in the due prosecution and carrying on of the works and premises." It may be necessary for working the mines that there should be engine houses, machine offices, counting houses, warehouses, store rooms, workshops, workmen's cottages, &c., and therefore this power is within the power contained in the settlement. The word "necessary" is not to be construed as that which is absolutely necessary, and without which the working of the mines could not be carried on, but that which, according to the usage of miners working with ordinary skill, would be necessary for carrying on the work. There is a further power to dig and use building or other stones and slates, brick earth and materials on any part of the lands, and to make the same into brick for building with, "and which shall be required for the purposes of the collieries and works or for any erection or building thereby authorized to be made in or about the exercise and enjoyment of any liberty, power or authority thereby granted or given." Possibly all the powers thereby granted are powers necessary for working the mines, and if restricted to the neighbourhood of the works they are found by the jury to be both necessary and usual. It is said that workmen's cottages are not authorized by the power; but there is this distinction, the building residences would be under the building power, the cottages for workmen are necessary for carrying on the works of the mine. The provision as to the lessees not being made dispunishable for waste raises the same question. If the power to build workmen's cottages is within the power in the settlement, the lessees are not made dispunishable for waste.

WILLIAMS, J.—I am of the same opinion. The words are, "all such powers, authorities, accommodations, &c. as shall be necessary *or* are usually contained in leases of col-

lieries or mines in the county, place or neighbourhood where the collieries or mines intended to be demised" &c. are situate, "for seeking, winning, working, drawing, taking and carrying away the coal." Under the power in the lease the lessee is authorized to build and construct upon the mines and lands all such engine houses, &c., workmen's cottages and accommodations "as shall be bonâ fide necessary or proper for or in the due prosecution and carrying on of the works and premises." The difficulty I have found has been with respect to the words "or proper" having introduced something different from the power in the settlement. That is a power to confer on the lessee all such accommodations &c. "as shall be *necessary or are usually contained* in leases" of collieries in the neighbourhood, not "or proper." But in point of fact the finding of the jury establishes that what is proper for the due prosecution of the works is necessary and usual. They certainly have not found it absolutely, but we must so construe the lease with reference to their finding; for if the lease be construed as giving a power to build without restriction, the jury have negatived it being necessary or usual. They have, however, found that the erection of cottages in places convenient with reference to the works was both necessary and usual, and therefore proper. The question as to the lessee being punishable for waste depends on whether it is necessary or usual to build workmen's cottages. Upon the whole, I think that the judgment of the Court below ought to be affirmed.

CROMPTON, J.—I am of the same opinion. The lease contains a general power to do all that is necessary or proper for carrying on the works. The only difficulty in my mind, as well as that of my brother *Williams*, arose from the introduction of the words "or proper." At first I doubted whether "proper" might not be larger than

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"necessary or usual," but I think it means the same thing. Then, as to this power being greater than the building power, I do not concur in the argument. The two powers are quite distinct. It is said that under this power the lessee might build houses, which he could not under the building lease; but that is not so. This is a power to build houses, if necessary or proper for carrying on the works. Upon the whole, I think that the Court below was right.

CROWDER, J.—I also think that the lease was a good execution of the power contained in the settlement. It seems to me that the power to build is quite distinct from the mining power. The former is a power to build any house, erection or building; the latter is a power to build only such as come under the denomination of engine houses, warehouses, workmen's cottages, &c. Then the question is, whether the power to erect workmen's cottages is in excess of the leasing power. The argument is, that the power is limited to that which is absolutely necessary for carrying on the works. It seems to me, however, that the fair construction of the leasing power is to authorize the making of mining leases with all the necessary or usual powers contained in leases of mines in the neighbourhood; and that this lease is not in excess of that power. Then it is said that the lease contains not only a power to build workmen's cottages, but also to dig building materials on any part of the land. That, however, is merely ancillary to the former power. If there is a power to build workmen's cottages, there is a power to dig building materials for that purpose. Therefore it comes to the question, whether the mining lease is warranted by the power. The words are, all such "accommodations as shall be bonâ fide necessary or proper for carrying on the works." I agree with my brother *Williams* that we must construe that—"such accommodations as are necessary or usually con-

tained in mining leases." That is the meaning of the word "proper;" and the jury have in effect found that it is usual and proper in leases of collieries to build cottages in places convenient with reference to the works.

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WILLES, J.—I am of the same opinion.

## IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

HOLMES v. WILLIAM KIDD and ROBERT KIDD.

Dec. 1.

**D**ECLARATION by indorsee against acceptors of a bill of exchange for 300*l.*, drawn by one Caleb Watson.

Plea—As to 272*l.* 2*s.* 7*d.*, parcel of the amount of the bill in the declaration mentioned, that before the indorsement or acceptance of the bill the defendants applied to the said Caleb Watson to advance them the sum of 300*l.*, which C. Watson agreed to do upon the terms of the defendants accepting the bill and depositing with him a policy of insurance on the life of the defendant W. Kidd and certain canvas of the defendants of the value, to wit, of 400*l.*, as a security for the due payment by the defendants of the said bill; the said drawer of the said bill to have power of selling the said canvas and applying the proceeds of such sale in payment of the amount due on the said bill, if the same was not paid by the defendants when due: that the said bill was accepted and the said

To a declaration by indorsee against acceptor of a bill of exchange for 300*l.*, the defendant pleaded, as to 272*l.* 2*s.* 7*d.*, that before the indorsement or acceptance he applied to the drawer to advance him 300*l.* which the drawer agreed to do on his depositing certain canvas with him and accepting the bill; the drawer to have power of selling the canvas and applying the proceeds in payment of the bill if not

paid by the defendant when due; that the bill was accepted and the canvas deposited on the terms aforesaid; that after the bill was due the drawer sold the canvas and received the proceeds, 272*l.* 2*s.* 7*d.*, and holds the same; and that the bill was indorsed by the drawer to the plaintiff after it became due and subject to the equity of the proceeds of the sale of the canvas being applied to the payment of the bill, and without value.—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the plea was good.

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policy and canvas deposited upon the terms aforesaid, and that after the said bill was due the said drawer sold the canvas and realized by such sale 272*l.* 2*s.* 7*d.*, and still retains and holds the same sum: that the bill was indorsed by the said drawer to the plaintiff, after the same was overdue and subject to the equity of the proceeds of the sale of the said canvas being applied to the payment and satisfaction of the said bill, and without any value or consideration having ever been given by the plaintiff for the said indorsement.—Demurrer and joinder.

Judgment having been given for the defendants on the demurrer to this plea in the Court below, the plaintiff assigned error.

*Atherton* argued for the plaintiff (*a*).—The effect of the agreement was to give to the drawer an option to sell the canvas and pay himself at any time while he continued the holder of the bill. At the moment of the indorsement a perfect title vested in the indorsee. That could not be affected by anything which the drawer might do after the bill left his hands. After the indorsement the drawer could not take the proceeds of the canvas in payment of the bill. The statement in the plea that the bill was indorsed without value is not material (*b*). The only consequence of that is that the indorsee took it subject to the equities attaching to the bill. [*Willes, J.*—The bill was subject to the equity that upon the sale of the canvas the consideration was at an end.] The equity referred to is one only between the drawer and the acceptor of the bill; it is a collateral contract that the drawer, having indorsed the bill, should give up the canvas to the acceptor.

(*a*) Before *Erle, J., Williams, J., Crompton, J., Crowder, J., and Willes, J.*      (*b*) See *Sturtevant v. Ford*, 4 Man. & G. 101, 106.

There was originally abundant consideration for this bill. The plaintiff therefore, by the indorsement, acquired a perfectly valid title, and is in the position of an innocent indorsee for value who cannot be affected by anything done by the person from whom he takes, subsequently to the indorsement to him.

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*Brett*, who appeared to support the plea, was not called upon.

ERLE, J.—We are all of opinion that the plea is good, and therefore the judgment must be affirmed. On the drawing of the bill there was an agreement that the canvas should be a security in the hands of the drawer, and if sold the proceeds should be applied in payment of the bill, if not paid by the defendant when due. The drawer held the bill till it was overdue, when he indorsed it without value to the plaintiff, and afterwards sold the canvas and held the proceeds to be applied to the payment of the bill. The question is, whether the receipt of the money by the drawer is a bar to this action. The plaintiff took the bill subject to the equities affecting it. In the hands of the drawer the right to sue was defeasible; when he sold the canvas it was defeated, and the plaintiff took the bill subject to that contingency.

WILLIAMS, J.—I am of the same opinion. I agree that, when it is said that an indorsee takes subject to equities, the equities must arise out of the original transaction. Here the incumbrance on the bill was part of the transaction out of which the bill arose.

CROMPTON, J.—Upon the concoction of this bill it was agreed that it was not to be paid if the canvas was sold. That agreement directly affects the bill and was part of

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the consideration for it. The case therefore differs from that of a right of set-off against the indorser (*a*), which is merely a personal right not affecting the bill. In the present case the equity directly attaches to the bill. The plaintiff therefore got a defeasible title only.

CROWDER, J.—The plea is an answer to the action. The case is within the ordinary rule applying to parties taking a bill by indorsement subject to equities which affect it.

WILLES, J., concurred.

Judgment affirmed.

(*a*) See *Oulds v. Harrison*, 10 Exch. 572; *Burrough v. Moss*, 10 B. & C. 558.

## IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

Dec. 2.

ERICHSEN and Others v. BARKWORTH and Others.

The defendants, merchants at Hull, chartered the plaintiffs' ship to sail to

Buctouche

and there load a cargo of timber, and being so loaded to proceed to Gloucester and deliver the same on being paid freight. Thirty-five running days to be allowed for loading and discharging the cargo, and ten days on demurrage above the laying days at 5*l.* per day. The ship arrived at Buctouche, and the loading was completed at the expiration of twenty-seven of the running days. The master signed bills of lading by which the cargo was deliverable "unto order or to assigns, he or they paying freight for the goods as per charter-party." The invoice of the cargo and bills of lading together with a bill drawn by the shipper on the defendants for the price of the cargo was presented to the defendants by the shipper's agent in London, but the defendants refused to accept the bill or receive the cargo, on the ground that the shipment was not according to the contract. The defendants wrote to the shipper's agent and also to the master of the ship, offering to land the cargo and take care of it on their premises for whom it might concern. The shipper's agent gave notice to the master not to part with the cargo without production of the bill of lading. The vessel was ready to discharge her cargo, according to the charter, on the 5th September. The lay days expired on the 13th September. The vessel might have been discharged in five days. The bill of lading was not produced to the master until the 22nd September, and the delivery was completed on the 30th.—*Held*, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the defendants were liable for demurrage and detention of the vessel.

*Gray*, for the plaintiffs (a).—The plaintiffs are entitled to recover, not only for the demurrage days, but also for the days beyond the demurrage days, on this ground, that the holders of the bill of lading did not present it and remove the cargo. [*Crompton*, J.—The question is, whether the defendants have broken their contract.] The defendants are liable under the contract contained in the charterparty, and they seek to avoid their liability by saying that they offered to land the cargo for whom it might concern. But the master was not bound to accept their offer to unload, nor could he have safely done so, for the bill of lading was in the possession of the Bank of British North America, and being transferable by indorsement the master would have been liable to any person who produced it. The judgment of the majority of the Court below assumes that the master would have been justified in landing the cargo; but how could he tell that an indorsee of the bill of lading might not afterwards claim the cargo? *Bourne v. Gatliffe* (b) is an authority in the plaintiffs' favour.—The Court then called on

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*Mellish*, for the defendants.—The charterers were ready to pay the freight and land the cargo on account of the holder of the bill of lading, and unless the circumstance of the bill of lading not being produced justified the master in refusing to deliver the cargo, the charterers are not liable. This is not the case of a lost bill of lading. When the master received notice not to part with the cargo without the production of the bill of lading, he must have known that some person held it; and he ought to have replied, "If you pay the freight I am ready to deliver the cargo to you; if not, I will accept the offer of the char-

(a) Before *Erie*, J., *Williams*, and *Willes*, J.  
*J.*, *Crompton*, J., *Crowder*, J., (b) 7 Man. & G. 850.



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terers to unload it." The question is, what is the duty of the master when the owner of the bill of lading does not come in time and claim the cargo? It is submitted that the master is entitled to land the cargo at any convenient and proper place, to be kept for the holder of the bill of lading and at his risk. He could maintain no action against the master or shipowner if he neglected to claim the goods within a reasonable time. This bill of lading does not embody the terms of the charterparty as to lay days and demurrage, but simply makes the goods deliverable on payment of freight. On such a bill of lading the shipowner can maintain no action for demurrage: *Smith v. Sieveking* (a). If the bill of lading contains the terms "upon payment of freight and demurrage as per charterparty," the master is bound to wait during the lay days and demurrage days. [*Crompton, J.*—The charterer agrees that he himself, or the person who is the holder of the bill of lading, will discharge the cargo within the stipulated time. If that is not done, the master may within a reasonable time unload; but that is not a part of the contract, which is that the charterer shall be ready, by himself or the person who is holder of the bill of lading, to discharge the cargo.] Could the holder of the bill of lading have maintained any action against the master or shipowner for unloading the cargo? It is submitted that he could not, for two reasons: first, because having no time for which he could keep the ship, if he does not choose to claim the cargo he cannot complain that it is landed; secondly, because the contract under the bill of lading is not a contract between the shipowner and the shipper, but between the charterer and the shipper, and the master signs as agent for the charterer: *Marquand v. Banner* (b). The defendants are the persons against whom the action must be brought

(a) 4 E. &amp; B. 945.

(b) 6 E. &amp; B. 232.

by the holder of the bill of lading for not delivering the cargo: *Colvin v. Newberry* (a); and as they are liable they are entitled to say to the master, "Deliver the cargo to the shipper or his order if required; if not, we are the proper persons to receive the goods." There is no case which determines what is the duty of the master under a simple bill of lading for delivery of the cargo as per charter-party. *Gatliffe v. Bourne* (b) only decided that the master is not justified in landing the goods without giving the holder of the bill of lading a reasonable opportunity of taking them from alongside the ship. But if the holder of the bill of lading does not choose to claim the goods within a reasonable time, the master is entitled to land them; for what right has the holder of the bill of lading to require him to keep them in his ship as a warehouse and at his risk? There is no authority that, if the master lands the goods after a reasonable time has elapsed and they are lost, he is responsible. Here, the holders of the bill of lading having neglected to take the goods from alongside the ship, if the master had landed them and deposited them in a proper place, whatever happened to the goods no action could have been maintained against the shipowner or the master. Their contract was to deliver the goods to the holder of the bill of lading, provided he came for them: they never contracted to keep them for an indefinite time. If the master had complied with the request of the defendants and landed the goods, the holders of the bill of lading could have maintained no action against any one; consequently the detention was not the fault of the defendants, and the plaintiffs are not entitled to recover.

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ERLE, J.—I am of opinion that the judgment of the

(a) 1 Cl. & F. 283, 297.

(b) 4 Bing. N. C. 314.

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Court below ought to be reversed, as the defendants, according to their contract, are liable for the sum claimed. The contention on the part of the defendants is that they were ready to clear the ship, because they offered to take the goods without production of the bill of lading, and that if that offer had been accepted the master would not have incurred any liability or risk. I am, however, of opinion that the master would have incurred liability and risk, as, under the circumstances, the rights of the holder of the bill of lading extended beyond the time at which the offer was made. I think that the plaintiffs are entitled to recover, for the reasons given by my brother *Watson* in his judgment in the Court below, and I agree with him that they are entitled to recover the full amount claimed.

**WILLIAMS, J.**—I am of the same opinion. The law is correctly laid down in *Smith's Mercantile Law*, p. 294, 5th ed:—"The merchant must pay demurrage for any delay beyond the arranged period, even though not attributable to his fault, but to some unforeseen impediment to her loading or unloading, such as the crowded state of the docks; for he has expressly engaged and is bound by the terms of his own positive contract: so, though he may not have been apprised of the ship's arrival, or the bill of lading have not come to his hands, without which, or an indemnity, the master, as he has a right, refuses to deliver the goods." I can find nothing in this case to interfere with the right of the master to refuse to deliver the goods except on production of the bill of lading.

**CROMPTON, J.**—I am of the same opinion. The question arises on the contract in the charter-party. The charterers entered into a contract by which they undertook

that their factors should load at Buctouche a full and complete cargo, and on the arrival of the ship at her port of discharge that they would be ready by themselves or their factors to unload; and they also undertook that the ship should be discharged within a certain time, or that they would pay at a certain rate for demurrage. When the ship arrived they were not ready to unload her, because they were never in a position which gave them a right to do so, and therefore they ought to pay for their breach of contract. It is no excuse that the charterers had some dispute with the holders of the bill of lading. The shipowner has nothing to do with the persons whom the charterers have engaged to load the vessel. He has acted under the charter-party and taken the cargo on board; and the defendants are bound by their contract that they will be ready to discharge the ship, or that the persons having the bill of lading will do so. Admitting that the property in the goods was in another person, the master, by the bill of lading, is liable to the person in whom the property vests. He has a right to demand the bill of lading or an indemnity, for by signing the bill of lading he binds himself to deliver the goods to the person who has the property in them. It is said that this inconvenience would arise, that the master would be obliged to keep the goods for an unlimited time. But in truth there is no inconvenience. The charterers were to be allowed thirty-five running days, and after that they were to have ten days on demurrage at 5*l.* per day, so that if the shipowner recovered for the breach of contract he would be clearly entitled in respect of the demurrage days. Then, as to the not unloading after those days, the jury would have to estimate the damage, and if they found that there was any vexatious conduct on the part of the shipowner, such as keeping the goods for his

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own benefit, they would give him little damages. After the demurrage days he cannot keep the goods for an unlimited time, and then sue for damages. In this case, I see nothing unreasonable in the conduct of the master; indeed it is quite reasonable that he should wait until after the demurrage days had expired; and I think that the defendants are liable both for the demurrage days and the detention days.

CROWDER, J.—I am of the same opinion. The contract was between the shipowner and the charterer; and the question is whether the shipowner has performed his contract. He undertook to deliver the goods on production of the bill of lading: that was never produced to him, and therefore he was justified in detaining the goods. I entirely agree with the judgment of my brother *Watson*.

WILLES, J.—I am of the same opinion. In deciding questions of this kind, we should decide on the assumption that the usual and ordinary course of business will go on, and that no master of a vessel will be likely to keep a cargo for an indefinite time. When a bill of lading is in existence, the master has no more to do with the charterer than a stranger, unless he produces the bill of lading.

Judgment reversed.

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## IN THE EXCHEQUER CHAMBER.

LAING v. WHALEY and Another.

Feb. 8.

IN this case (reported *antè*, p. 675) judgment of affirmance was entered.

Erroneous  
entry of judg-  
ment amended.

*Hindmarch*, at the last sitting of the Court (Dec. 2), moved that the entry of the judgment be amended. He submitted that the opinions of the majority of the Court in effect amounted to a judgment of reversal.

PER CURIAM.—We will consider how the judgment ought to be entered.

*Cur. adv. vult.*

WIGHTMAN, J., now said:—We are of opinion that the verdict for the plaintiff upon the issue joined on the second plea ought to stand, and that the judgment ought to be arrested.

Judgment accordingly (a).

(a) Upon the first point *Williams, J., Crowder, J., and Willes, J.*, were in support of the verdict; and *Wightman, J., Erle, J., and Crompton, J.*, against it. Upon the second point *Wightman, J., Erle, J., Williams, J., and Crompton, J.*, were of opinion that the judgment ought to be arrested. *Crowder, J., and Willes, J.*, were of opinion that the declaration was good. *Crompton, J.*, (with whom *Erle, J.*, agreed) only thought the declaration might be

supported by supposing that an allegation of right was contained in it; which the Court in effect held that it did not contain. That as soon as the Court by a majority held the declaration proved, he considered that he was bound by that judgment; and assuming it to be proved by the facts stated, that is, without any right being proved, he was clearly of opinion that the declaration was bad.

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## MEMORANDA.

In last Trinity Term, the Hon. Sir *John Taylor Coleridge*, Knight, resigned his office of a Judge of the Court of Queen's Bench. He was succeeded by *Hugh Hill*, Esquire, one of Her Majesty's counsel, who was first called to the degree of the coif, and gave rings with the motto "Nil nisi cruce." He afterwards received the honour of knighthood.

In the Vacation preceding Hilary Term 1858, *Jesse Addams*, Esquire, D.C.L., *Robert Joseph Phillimore*, Esquire, D.C.L., *James Parker Deane*, Esquire, D.C.L., and *Travers Twiss*, Esquire, D.C.L., were appointed her Majesty's counsel.

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*Authority to refer—Partner.*

A. and B. partners, dissolved the partnership upon the terms that all debts due to and owing by the firm should be received and paid by A. A. employed C., an attorney, in winding up the affairs. A. having brought an action against D., in the names of himself and B., for a debt alleged to be due to the firm, and a plea of set-off having been pleaded, *all matters in difference between A. and B. and D.* were by a Judge's order and by the consent of the attorneys employed in the cause, referred to the award of M. C. acted solely under A.'s instructions, without any express authority from B. In an action brought on the award:—*Held*, that the submission was not



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### BAILOR AND BAILEE.

*Right of Bailee to set up title of  
third person.*

To an action of trover for goods the defendants pleaded that the goods were delivered by the plaintiff to the defendants to be by them warehoused and taken care of; that before the delivery the goods had been the property of one T. deceased, and that there was not at the time of the delivery any legal representative of the estate of T.; and that this fact was concealed from the defendants; that afterwards H. obtained letters of administration to the effects of T. and claimed the goods, and forbade the defendants to deliver them to the plaintiff.—*Held* a good plea.

*Semble*, that a warehouseman being a bailee of goods is not estopped from disputing the title of his bailor; but that, if the goods are the property of another, he may refuse to redeliver them, if he does so relying upon the right and title and by the

### BANKING COMPANY.

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### BANKRUPT.

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#### (1). *Deed of Arrangement.*

A deed of arrangement, under the 224th section of "The Bankrupt Law Consolidation Act, 1849," must provide for the distribution of all the debtor's estate and effects, and amongst *all* his creditors. But a deed providing for the distribution of all the debtor's estate amongst all the creditors, who would have been creditors under an adjudication of bankruptcy on the day of the meeting of creditors, treating such creditors as creditors for the sums they would on that day be entitled to prove for in bankruptcy, is not invalid, because: First, it does not contain an express assignment by the debtor of his estate, but only a covenant to assign it when required by the inspectors: Secondly, because it makes no provision for creditors who may have become so between the day of the meeting and the date of the deed, it not appearing that there were any creditors who became so between those times: Thirdly, because it contains a letter of license which is absolute and not conditional: Fourthly, because it does not contain a provision rendering it absolutely void if the debtor does not perform the covenants contained in it.

A deed of arrangement under the 224th section is not invalidated by reason of its containing the following provisions.—First: A power to employ the debtor in winding up his

affairs under the direction of inspectors, and for the debtor to employ persons under him with the sanction of the inspectors, and to pay those persons such reasonable remuneration as the inspectors shall think fit. Secondly: An authority to the inspectors to make advances to the debtor, in respect of any mercantile operations which may have been undertaken by the debtor. Thirdly: A provision for the payment of the costs and expenses of and attending the preparation of the deed and perusal thereof, and the management of the debtors' affairs between the meeting of the creditors and the execution of the deed, or relating, or preparatory to the meeting of creditors, and incident thereto, and to the investigation of affairs since the debtor stopped payment. Fourthly: a discretionary power in the inspectors to retain the dividend which would be payable to a creditor, who at the declaration of the dividend, had not acceded to the deed, such creditor being at liberty to prove, so as to have a dividend out of existing or future funds, but so as not to disturb the former dividend. Fifthly: A power, in case the debtor should commit an act of bankruptcy, for the inspectors to retain 500*l.* for a certain period, as an indemnity against losses, costs, and expenses. Sixthly: A power to the inspectors to avoid the deed in certain events, at the expiration of three months from its date, excepting from the avoidance all acts, proceedings, conveyances, assignments, assurances, matters and things done under and by virtue of it; there being also a power to the inspectors, at any time after the date of the deed, to grant a certificate of conformity, as in bankruptcy, to all or either of several debtors. *Semble*, that the avoidance of the deed, under

the provision in question, would avoid the effect of such a certificate if previously granted to any such debtor.

In order to prove a deed of arrangement, the defendants produced from the Court of Bankruptcy a certificate of the inspectors, filed there in conformity with the 226th section of the Bankrupt Law Consolidation Act, 1849, and an account and affidavit of the defendant in conformity with the 227th section. The account included the debts and names of the creditors mentioned in the schedule to the deed. The certificate and other documents were not filed until after action brought. The defendants also proved that the deed was, for some time before the commencement of the action, in the same state as to the execution thereof by the several parties as when produced at the trial, with the exception of two creditors, without whom 6-7ths in number and value appeared to have executed.—*Held*, sufficient evidence of the due execution of the deed. *Irving and Another v. Gray, Hutton and Others*,

34

## (2). *Order for Protection.*

The plaintiff, a bankrupt, who had obtained an order for protection to complete his examination, under the 112th section of the Bankrupt Law Consolidation Act, 1849, at the time of his bankruptcy owed two poor rates, and had been assessed to a third, but such third rate was not allowed or published until after his bankruptcy. The defendants, overseers of the poor, during the continuance of such protection, summoned the plaintiff for the nonpayment of the three rates. The plaintiff did not attend before the justices. It did not appear what took place at

the hearing, but it was shewn that the plaintiff had returned the summons served on him to one of the defendants, who was the assistant overseer, with the facts respecting his protection written upon it. The justices issued a distress warrant for the three rates, which proving ineffectual, a warrant of commitment issued upon which the plaintiff was taken, carried to prison and kept there during the period of protection granted to him.

*Semble*, that under such circumstances no action could be maintained by the plaintiff against the defendants.

But *Held*: First, that there was no absence of reasonable and probable cause for supposing that the Court of Bankruptcy had not power to protect the plaintiff from arrest in respect of the rates made before, but not allowed till after the bankruptcy.

Secondly, that there was no absence of reasonable and probable cause for supposing that the protection granted to the plaintiff did not avail against the warrant for arrears of all the rates.

Thirdly, that in the absence of any evidence that the defendants had concealed anything or done anything but speak the whole truth before the justices, there was no evidence of malice.

Fourthly, that trespass would not lie against the defendants for causing the plaintiff to be arrested under the warrant.

*Held*, also, that the remedy given by the 113th section does not affect the right of action of a bankrupt wrongfully arrested in violation of the privilege given by the 112th section.

*Semble*, that the protection under the 112th section does not extend to a warrant of commitment for non-payment of poor rates made before

but not published or allowed by the justices till after the bankruptcy.

*Quære*, whether bankruptcy, before certificate, has any operation upon a demand for poor rates. *Phillips v. Naylor, Moody and Others*, 14

The defendant being indebted to the plaintiff on a bill for 251., accepted by him for the accommodation of one B., was served with a writ of summons on the 23rd of July, and judgment was signed on the 31st for 29l. 15s. debt and costs. On the 24th the defendant petitioned the Court of Bankruptcy for protection, under the 211th section of the Bankrupt Law Consolidation Act, 1849; and in the account of his debts, filed under the 214th section, on the 17th of August, inserted the plaintiff as a creditor for the bill, saying nothing as to the consideration or as to the costs. His proposal for the compromise of his debts was duly assented to at two private sittings by majorities consisting of 3-5ths of his creditors, who had proved debts amounting to 10l. The Court approved and confirmed the proposal, and granted to the defendant a certificate of the filing and entering of record of such approval, &c., and endorsed on such certificate a *protection from arrest*, under the 216th section, until 25th of March, 1859. The defendant's goods having been seized under a *fi. fa.* in the action at the suit of the plaintiff, and a Judge at Chambers having set aside the execution: on motion to set aside this order, on the grounds; first, that the defendant's property was not protected by the order under section 216; secondly, that the protection was void against the plaintiff, on the ground that his debt was not truly specified; thirdly, that the order should not have been to set aside the execution, but simply that the sheriff should withdraw:—*Held*, that

the defendant's property was protected, and that the order was rightly made. *Jones v. Simson*, 886

(3). *Bond for Debt barred by Certificate.*

A bond is a "contract, promise or agreement" within the meaning of the 204th section of the "Bankrupt Law Consolidation Act, 1849;" and therefore a bond, given by a bankrupt for payment of a debt barred by his certificate, is void. *Kidson v. Turner*, 581

(4). *Mortgage of Ship.*

A., being owner of a ship which was unfinished, on the 5th of July mortgaged it to B. A., on the 5th of August, registered the ship as owner pursuant to The Merchant Shipping Act, 1854, (17 & 18 Vict. c. 104), s. 42. On the following day B. caused the mortgage to himself to be inserted on the register. A. having become bankrupt:—*Held*, that A.'s assignees could not maintain trover against B. for the ship. *Bell and Another, Assignees of Batley, a Bankrupt, v. The Bank of London*, 780

BILL OF EXCHANGE.

See JOINT STOCK COMPANY, (3), (4).  
PARTNERSHIP.  
VENDOR AND VENDEE.

(1). *Acceptance.*

Goods having been ordered by E. were invoiced to "E. and Son," and a bill was drawn for the price on "E. and Son." The bill was ac-

cepted in the handwriting of the son, in name of E. and son. The son was not a partner, and it was alleged that he accepted the bill only as his father's amanuensis.—*Held*, that if the son had so conducted himself that the drawer of the bill might reasonably have believed and did believe that he was a partner, he was liable on the bill. *Gurney v. Evans*, 122

(2). *Indorsement per Procuracion.*

A declaration on a bill of exchange against the acceptor, alleged an indorsement by the drawer to the H. Company and by the Company to the plaintiff. Plea traversing the indorsement by the Company. It was proved that the bill had been indorsed in blank by the drawers, and afterwards delivered by them to the Company. It was indorsed by two directors, "per proc. of the Company," to the plaintiff. By the deed of settlement and resolutions which were duly registered, the directors had no power to endorse the bill.—*Held* that, whether or not the Company was bound, the indorsement being sufficient to transfer the property and right of suit on the bill, the allegation in the declaration was proved.

*Quære*, whether the rule, that a person taking a bill indorsed "per procuracion" is bound to take notice of the extent of the authority of the person indorsing, applies to the case of a partner indorsing "per procuracion." *Smith v. Johnson*, 222

(3). *Indorsement after Bill became due and subject to Equities.*

To a declaration by indorsee against acceptor of a bill of exchange for 300*l.* the defendant pleaded as

to 272*l.* 2*s.* 7*d.*, that before the indorsement or acceptance he applied to the drawer to advance him 800*l.* which the drawer agreed to do on his depositing certain canvas with him and accepting the bill; the drawer to have power of selling the canvas and applying the proceeds in payment of the bill if not paid by the defendant when due; that the bill was accepted and the canvas deposited on the terms aforesaid; that after the bill was due the drawer sold the canvas and received the proceeds, 272*l.* 2*s.* 7*d.*, and holds the same; and that the bill was indorsed by the drawer to the plaintiff after it became due and subject to the equity of the proceeds of the sale of the canvas being applied to the payment of the bill, and without value.—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the plea was good.  
*Holmes v. Kidd*, 891

#### (4). *Notice of Dishonour.*

The holder of a bill of exchange, on the day after it became due, called at the office of J., the drawer, and on being told that he was engaged wrote on a scrap of paper and sent in to him the following notice:—"B.'s acceptance to J., 500*l.*, due 12th January, is unpaid: payment to B. & Co. is requested before 4 o'clock." The clerk who took in the notice said "It should be attended to."—*Held* a sufficient notice of dishonour.

Also that under the circumstances, it was a question for the jury whether there was not a sufficient intimation that the bill was dishonoured. *Paul, Public Officer of Stuckey's Somersetshire Banking Company v. Joel*, 455

#### (5). *Onus of Proof of Consideration.*

Action by indorsee against drawer of a bill of exchange. Plea: that the defendant indorsed the bill and delivered it to W. to get discounted for the defendant and pay him the proceeds: that the bill was never discounted for the defendant, nor was there any consideration for his indorsing it or paying the amount thereof: and W., in fraud of the defendant, indorsed the bill to the plaintiff without consideration. At the trial, the defendant proved that he indorsed the bill in blank and delivered it to W. to get discounted for him, which W. promised to do and bring him the money on the following morning. W. took away the bill, but never returned, and the defendant heard no more of it until payment was demanded by the plaintiff's attorney.—*Held* sufficient evidence of illegality to cast on the plaintiff the onus of proving consideration. *Hall v. Featherstone*, 284

#### BILL OF LADING.

*See* CHARTER-PARTY.  
VENDOR AND VENDEE.

#### BILL OF SALE.

##### (1). *Description of Assignor— Fraudulent Conveyance.*

W., described as "gentleman," by bill of sale, registered under 17 & 18 Vict. c. 36, conveyed goods to M. M., in W.'s presence, assigned the goods to B. to secure an advance made *bonâ fide*. W. had been a colliery agent, but for six months before the date of the bill of sale had been out of employment. There was evidence that the conveyance to M. was fraudulent and void as against W.'s creditors under 13 Eliz. c. 5.—

*Held*: First, that the conveyance to B. being *bonâ fide* and without notice, his title was good as against such creditors.

Secondly, that W. was sufficiently described in the bill of sale and affidavit as "gentleman."

*Quære*, whether, if such description had been insufficient, B.'s title would have been affected. *Mary Morewood and William Bayne v. The South Yorkshire Railway and River Dun Company*, 798

(2). *Description of Occupation of Attesting Witness.*

Under the 17 & 18 Vict. c. 36, which requires to be filed an affidavit of the description of the *occupation* of every attesting witness to a bill of sale, it is not a compliance with the statute to describe as "gentleman" a witness, who though formerly an attorney, was at the time of the attestation acting as an attorney's clerk. *Tuton v. Sanoner*, 280

(3). *Onus of Proof of Occupation.*

Under the 17 & 18 Vict. c. 36, s. 1, where the occupation of a party to, or the witness of, a bill of sale, is not stated, the onus of proving that such party or witness has an occupation lies on the party seeking to impeach the bill of sale on that ground. *Daniel Sutton v. Bath*, 382

(4). *Assignment of Looms and other Effects on a Mill particularly set forth in Schedule.*

The plaintiff assigned to the defendant by bill of sale, "all and singular the 104 power looms and other effects and things belonging thereto, now being in, upon, or about the mill, particularly set forth in the schedule." The schedule was as follows:—"Looms made by S." The

looms were in use at the date of the execution of the bill of sale. Healds, reeds, weft and waste cans are attached to the looms when in use, and the looms are not complete for the purpose of weaving till they are supplied, but they form no part of the looms as they come from the makers. They are made and often sold at sales separately from the looms. Different healds and reeds are used in weaving cloth of different degrees of fineness; they do not ordinarily belong to any particular loom, but can be detached and used with any loom indifferently.—*Held*, that the healds, reeds, cans, &c., which were on the premises at the time of the execution of the bill of sale passed to the defendant. *Cort v. Sagar*, 370

(5). *Unregistered Bill of Sale—Bankrupt—Jus Tertii.*

A. conveyed goods by bill of sale to B. By a second bill of sale A. conveyed the same goods to C. A. having become bankrupt, and the first bill of sale not having been duly registered pursuant to 17 & 18 Vict. c. 36, s. 1, A.'s assignees brought an action of trover for the goods.—*Held*, that B. could not set up the bill of sale to C. against the assignees. *Nicholson and Another, assignees of Bowman a bankrupt, v. Cooper*, 384

BOND.

See BANKRUPT, (3).  
COSTS, (4).

*Stay of Proceedings on Payment of Interest and Costs.*

A joint and several bond was conditioned for payment of the principal money after six months notice, and

in the mean time for payment of interest on the usual quarter days. Default having been made in payment of one quarter's interest (as it was said through inadvertence), the obligee gave notice to pay the principal, and the next day brought actions on the bond against the several obligors.—*Held*, that the Court had no power to stay the proceedings on payment of the interest due and costs. *Wheelhouse v. Ladbroke*, 291

## BUILDING CONTRACT.

*Flooring not Mentioned in Specification.*

The plaintiff agreed to build a house for the defendant, who prepared a specification which contained particulars of the different portions of the work. Under the head "Carpenter and Joiner," there was specified the scantling of the joists for the different floors, the rafters, ridge and wall pieces, but no mention was made of the flooring. The specification stated that "the whole of the materials mentioned or otherwise in the foregoing particulars, necessary for the completion of the work, must be provided by the contractor." At the foot of the specification the plaintiff signed a memorandum, whereby he agreed with the defendant "to do all the works of every kind mentioned and contained in the foregoing particulars, according in every respect to the drawings furnished or to be furnished, for the sum of 1100*l*. The house to be completed and fit for the defendant's occupation by the 1st of August, 1858." The plaintiff prepared the flooring boards, brought them to the premises, and planed and fitted them to the several rooms, but refused to lay them down without extra pay-

ment, because the flooring was not mentioned in the specification, whereupon the defendant put an end to the contract, took possession of the work, and proceeding to complete the building used the flooring boards so prepared and fitted by the defendant:—*Held*, First, that the plaintiff was not entitled to recover for the flooring as an extra, because it was included in the contract, though not mentioned in the specification. Secondly, that the plaintiff could not maintain trover for the flooring boards left on the premises by him and subsequently used by the defendant. *Williams v. Fitzmaurice*, 844

## CANAL.

*Liability of Navigation Commissioners for neglect to give notice to Lessee to repair.*

An Act enabling navigation Commissioners to grant a lease of a canal contained a clause as follows:—In case the lessees during the term should permit the navigation to be out of repair, the Commissioners "are hereby authorized and required to give notice thereof to such lessees, &c., and in such notice to specify the particular repairs which ought to be done; and the Commissioners may by such notice require that such repairs should be commenced, proceeded with and finished within reasonable periods to be named by the Commissioners, and in case the lessees shall neglect to commence, &c., such repairs, &c., then it shall be lawful for the Commissioners and they are hereby authorized to take possession of the tolls, &c., and to cause such repairs to be done under their own direction, and to pay the necessary expenses of making such repairs out of the said tolls," &c.

The lease having been granted in pursuance of the Act, during its continuance one of the locks of the canal became out of repair, but the Commissioners, though they knew of the want of repair, gave no notice of it to the lessee, though a sufficient time had elapsed for the giving of such notice. A barge entered the canal while the lock was so out of repair, but was prevented from getting out again by the falling in of the lock.—*Held*, that no action lay by the owner of the barge against the navigation Commissioners for neglecting to give notice to the lessees to repair, on the ground that the detention of the barge was not a damage naturally flowing from the neglect of the Commissioners to give notice, it not being shewn that if such notice had been given the lessees would have repaired, or that the Commissioners would have taken possession and repaired. *Walker v. Gos and Another, Clerks, &c.*, 395

### CAPIUS AD SATISFACIENDUM.

See SHERIFF, (3), (4).

### CARRIER.

#### (1). *Duty of Carrier on refusal of Consignee to receive Parcel.*

The plaintiff delivered in London to the defendants, who were common carriers, a parcel addressed to the plaintiff's agent at Plymouth. The defendants' railway terminates at Bristol, from whence they forwarded the parcel to Plymouth by the South Devon Railway, and shortly before noon, on the day of its arrival, a porter tendered it to the plaintiff's agent, who refused to pay the sum charged for its carriage, whereupon the porter took it away, saying that

it would be returned to London; and it was accordingly sent back to London at eight o'clock in the morning of the following day. About two hours afterwards the plaintiff's agent tendered at the office of the South Devon Railway the amount of the carriage and demanded the parcel, when he was told that it had been that morning returned to London. The parcel remained in the custody of the defendants at their office in London, and it did not appear that the plaintiff had applied for it there. The jury found that the parcel was sent back to London unreasonably soon; and that the demand of the parcel and tender of the charge for the carriage was made within a reasonable time after the parcel had been refused.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that, under these circumstances, the defendants were liable for a breach of duty, even supposing their duty *qua* carriers ended with the tender of the parcel: Per *Cockburn, C. J., Crompton, J., Williams, J., and Willes, J. Crowder, J.*, dissentiente. *Wightman, J.*, dubitante.

Also that there was no evidence of a conversion: Per *Crowder, J.*, and *Wightman, J.*

A declaration stated that the plaintiff delivered to the defendants, as common carriers, a parcel to be carried by them from London to Plymouth, and alleged as a breach the nondelivery of the parcel to the plaintiff at Plymouth. The defendants pleaded a tender on payment for the carriage, but that the plaintiff refused to pay the amount, whereupon the defendants refused to deliver the parcel. The plaintiff replied that within a reasonable time after the defendants had tendered the parcel, he offered at Plymouth to pay for its carriage and requested



the defendants to deliver it, but they refused to deliver it at Plymouth. The defendants having taken issue on this replication, the jury found that the allegations in it were proved.—*Held*, that if the circumstance of the defendants having sent back the parcel to London afforded an excuse for its nondelivery, that should have been especially rejoined: Per *Wightman, J. The Great Western Railway Company v. Crouch*, 183

(2). *Notice in Handbill limiting Liability—Freight Note.*

The defendants, owners of a steam-vessel plying between Bristol and London, issued every month handbills of the times of their vessels sailing, and which contained a notice that they "received goods for shipment on the conditions and agreement only that they are not liable for inward condition, leakage, and breakage, and that they would not receive any goods for conveyance by their vessels except upon the terms that they should not be responsible for any loss or damage of or to such goods from any cause whatever during the voyage." On the 8th March, the plaintiffs, who had received these handbills, shipped on board one of the defendants' vessels two casks of brandy to be carried to Falmouth. On the 11th March the shipping broker delivered to the plaintiffs a freight note, at the foot of which was a notice that the defendants did not hold themselves liable for leakage of oils, spirits, or other liquids, unless from bad stowage. In the course of the voyage one of the casks of brandy was staved in and nearly all its contents lost:—*Held*, that the notice in the handbills constituted the terms of

the contract under which the goods were shipped, and that those terms were not qualified by the notice at the foot of the freight note, and consequently the defendants were not responsible. *Phillips and Another v. Edwards and Others*, 813

(3). *Payment for lost goods to Person by whom they were delivered without notice that he was Agent.*

To an action against a carrier for the loss of the plaintiff's goods, it is no answer that the goods were delivered to the defendants by A., who as consignor thereof, claimed compensation for the loss, and that the defendant paid him, as such consignor, without notice that he was the agent of the plaintiff, and believing that he delivered the goods on his own account, and was the person entitled to sue. *Coombs v. The Bristol and Exeter Railway Company*, 1

CHARTER-PARTY.

*See PRINCIPAL AND AGENT, (1).*

(1). *Freight.*

S. and W. chartered a ship from Liverpool to Calcutta and home for the sum of 7000*l*. "The freight to be paid 1250*l*. on vessel clearing from Liverpool, and 1000*l*. on delivery of the outward cargo at Calcutta, the remainder in cash two month's from the vessel's report inwards, and after right delivery of the cargo, or under discount at 5 per cent. per annum at freighter's option. The master to sign bills of lading at any rate of freight required without prejudice to this charter-party. The owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and

demurrage." There were provisions for payment of the freight in cash on delivery of the cargo, if the cargo was delivered abroad. S. & C., who were the charterer's agents at Calcutta, having made advances to disburse the vessel, shipped a quantity of linseed, for which the captain signed bills of lading deliverable to their order or assigns on payment of freight at 5s. per ton, the current rate being 5l. 10s. Against this shipment S. & C. drew a bill of exchange and indorsed and delivered it together with the bill of lading for value.

*Held*: First, that assuming the charter-party to have created a lien for the charter-party freight as against the charterer, a bonâ fide indorsee of the bill of lading, without notice of the charter-party, was entitled to the linseed on payment of the bill of lading freight.

Secondly, that the charter-party did not create any lien in respect of that part of the freight which was payable at two months after the vessel's report inwards. *Foster, Public Officer, &c. v. Colby*, 705

The defendant chartered a ship to load a full cargo "on being paid freight, payable by charterer's acceptance, on ship clearing the custom house at L., subject to insurance." The ship, having sailed, was lost, being at that time uninsured. In an action by the shipowner for the non-payment of the agreed freight.—*Held*, that it was no defence that the shipowner had not insured the freight.

*Semble*, that the shipowner was not bound to insure, but was to receive the freight in advance less the amount of premium on a policy of insurance to be effected by the charterer. *Jackson v. Isaacs*, 405

## (2). *Demurrage.*

The defendants, merchants at Hull, chartered the plaintiffs' ship to sail to Buctouche and there load a cargo of timber, and being so loaded to proceed to Gloucester and deliver the same on being paid freight. Thirty-five running days to be allowed for loading and discharging the cargo, and ten days on demurrage above the laying days at 5l. per day. The ship arrived at Buctouche, and the loading was completed at the expiration of twenty-seven of the running days. The master signed bills of lading by which the cargo was deliverable "unto order or to assigns, he or they paying freight for the goods as per charter-party." The invoice of the cargo and bills of lading together with a bill drawn by the shipper on the defendants for the price of the cargo was presented to the defendants by the shipper's agent in London, but the defendants refused to accept the bill or receive the cargo, on the ground that the shipment was not according to the contract. The defendants wrote to the shipper's agent and also to the master of the ship, offering to land the cargo and take care of it on their premises for whom it might concern. The shipper's agent gave notice to the master not to part with the cargo without production of the bill of lading. The vessel was ready to discharge her cargo, according to the charter, on the 5th September. The lay days expired on the 18th September. The vessel might have been discharged in five days. The bill of lading was not produced to the master until the 22nd September, and the delivery was completed on the 30th.—*Held*, that the defendants were not liable for demurrage or detention of the

vessel: Per *Pollock, C. B., Martin, B., and Bramwell, B.—Watson, B.,* dissentiente. *Erichsen and Others v. Barkworth and Others,* 601

The defendants, merchants at Hull, chartered the plaintiff's ship to sail to Buctouche and there load a cargo of timber and being so loaded to proceed to Gloucester and deliver the same on being paid freight. Thirty-five running days to be allowed for loading and discharging the cargo, and ten days on demurrage above the laying days at 5*l.* per day. The ship arrived at Buctouche, and the loading was completed at the expiration of twenty-seven of the running days. The master signed bills of lading by which the cargo was deliverable "unto order or to assigns, he or they paying freight for the goods as per charter-party." The invoice of the cargo and bills of lading together with a bill drawn by the shipper on the defendants for the price of the cargo was presented to the defendants by the shipper's agent in London, but the defendants refused to accept the bill or receive the cargo, on the ground that the shipment was not according to the contract. The defendants wrote to the shipper's agent and also to the master of the ship, offering to land the cargo and take care of it on their premises for whom it might concern. The shipper's agent gave notice to the master not to part with the cargo without production of the bill of lading. The vessel was ready to discharge her cargo, according to the charter, on the 5th September. The lay days expired on the 13th September. The vessel might have been discharged in five days. The bill of lading was not produced to the master until the 22nd September, and the delivery was completed on the 30th.—*Held*, in the Exchequer

Chamber (reversing the judgment of the Court of Exchequer), that the defendants were liable for demurrage and detention of the vessel. *Erichsen and Others v. Barkworth and Others,* 894

## CHELTENHAM IMPROVEMENT ACT, 1852.

(15 VICT. c. 1.)

### *Liability of Commissioners for Negligence.*

The plaintiff was the owner of premises in Cheltenham which were drained by a sewer which emptied itself into the river Chelt. At the mouth of this sewer there was a flap or penstock which prevented any water of the river from flowing up the sewer. In the year 1852 an act of parliament passed for improving the town of Cheltenham (15 Vict. c. 1.), and which directed the Commissioners appointed under it to make new sewers. Accordingly the Commissioners constructed a new sewer which passed under the river Chelt near the plaintiff's premises, and removed the flap from the mouth of the old sewer and connected it with the new sewer. The plaintiff's premises were twelve feet below the summit level of the new sewer. In July 1855 there was a heavy storm of rain, by which the river Chelt was flooded, and in consequence the new sewer burst and the water of the river flowed into it. The Commissioners erected a stank round the hole, but before the repair of the sewer was completed another extraordinary flood took place, by which the stank was washed away and the water of the river rushed into the sewer and forced the sewage matter and water into the plaintiff's premises, thereby causing great damage. The 15 Vict. c. 1, incorporates the

144th section of the Public Health Act, 1844, which provides "that full compensation shall be made out of the general or special district rates to be levied under this Act, to all persons sustaining any damage by reason of the exercise of any of the powers of this Act."—*Held*, first, that the Commissioners were liable to an action for negligence, and were entitled to reimburse themselves out of the rates: Secondly, that they were guilty of negligence in not putting up a flap or penstock at the mouth of the old sewer. *Ruck v. Williams, Clerk, &c.*, 308

## COMMON LAW PROCEDURE ACT, 1852.

### See PRACTICE (3).

#### *Order under 7th Section.*

Twelve months after issue joined in an action, a Judge made an order that the plaintiff's attorney should "declare in writing to the defendant's the plaintiff's occupation, &c., and that after five days all further proceedings should be stayed until such delivery." The order having been duly served and disobeyed:—*Held*, that the order was not within the 7th section of The Common Law Procedure Act, 1852, and that an attachment would not lie against the attorney for such disobedience. *Malpass v. Mudd*, 246

## COMMON LAW PROCEDURE ACT, 1854.

### (1). *Interrogatories.*

If a party interrogated under the 51st section of The Common Law Procedure Act, 1854, as to whether he has in his possession any deeds

or writings relating to the lands in dispute, answers on oath that he has, but that such deeds relate exclusively to his own title to the lands, and do not shew any title in the opposite party, he cannot be compelled to state the contents of the deeds, or to describe them, his oath as to their effect being conclusive. *Adams v. Lloyd and Another*, 351

### (2). *Inspection of Documents.*

In an action for a breach of contract in not accepting goods, to which the defendant pleaded fraud, a Judge having made an order for the inspection of correspondence between the plaintiffs and the consignors of the goods and the plaintiffs and their broker, after the contract and alleged breach.—*Held*, that the order was properly made in the exercise of the discretion of the Judge. *Colman, Palmer and Clark v. Trueman and Rouse*, 871

### (3). *Garnishment—Attachment Order.*

Where, in a garnishment proceeding under the Common Law Procedure Act, 1854, the garnishee disputes his liability, and the judgment creditor declines to proceed by writ under the 64th section, the garnishee is entitled to have the attachment order dismissed with costs. *Wintle, judgment creditor, v. Williams, judgment debtor, Smith, garnishee*, 288

### (4). *Power to remit matters to Arbitrator.*

The rules of law, as to setting aside awards under ordinary references, apply to compulsory references under The Common Law Procedure Act, 1854, and the 8th section of that Act only enables the Court to remit the matters referred

to the arbitrator in cases where they would otherwise set aside the award.

Therefore where, on a compulsory reference under that Act, the defendant set up the Statute of Limitations, and the plaintiff relied on a running account, and the arbitrator certified that he was entitled to recover, the Court refused to remit the matter to the arbitrator on an affidavit that he was mistaken as to the law and fact. *Hogge v. Burgess*, 293

(5). *Reference to County Court Judge—Account.*

An action having been brought by a succeeding rector against his predecessor, to recover damages for dilapidations to the rectory house, at Colchester in Essex, and money having been paid into Court, a Judge made an order under the 3rd section of the Common Law Procedure Act, 1854, that the "cause be referred to the County Court judge of Essex." The order was delivered to G., the judge of the County Court of Essex, held, amongst other places, at Colchester, who refused to take the reference, on the ground that he was fully occupied with the business of the County Court. It appeared that there were other judges of County Courts in Essex. A rule having been obtained calling on G. to shew cause why he should not proceed with the reference pursuant to the Judge's order.—*Held*: First, that G. was the person intended and was sufficiently designated in the order; and that, even if he were not, it was no objection to his proceeding with the reference under that rule.

Secondly, that the matter in dispute was a matter of mere account within the meaning of the 3rd section of the Common Law Procedure Act, 1854; and that, even if it were

not, the County Court judge could not on that ground refuse to proceed with the reference, since the statute only requires that it should appear "to the satisfaction of the Judge," that the matter is of such a nature, and if his decision is erroneous the proper course is to appeal to the Court.

Thirdly, that the County Court judge had no option but was bound to obey the order and proceed with the reference. *Cummins v. Birkett*, 156

COMPANIES CLAUSES CONSOLIDATION ACT, (8 & 9 Vict. c. 16, s. 36).

*See* RAILWAY COMPANY, (1).

COMPOSITOR.

*See* PRINTER.

CONDITION PRECEDENT.

*See* COVENANT.

CONSIDERATION.

*See* BILL OF EXCHANGE, (5).

CONSIGNOR AND CONSIGNEE.

*See* CARRIER.

STATUTE OF FRAUDS.

CONSTABLE.

*Arrest without Warrant.*

A constable is not justified in arresting a supposed offender for felony, without warrant, at the instigation of a third party, unless there exists a reasonable charge and suspicion.

In June 1857, the cart of the plaintiff, who was a butcher, was being driven by his servant, when

J., a person in the habit of attending fairs, stopped the cart and said to the defendant, a constable, "these are my traces which were stolen at the peace rejoicing in 1856." The defendant sent for the plaintiff, who immediately attended, and asked him how he accounted for the possession of the traces. The plaintiff said that he had seen a stranger pick them up in the road and he had bought them of him for a shilling. The defendant then took the plaintiff into custody and brought him before a magistrate, by whom he was discharged.—*Held*, that under these circumstances there was no reasonable charge, and that the defendant was liable in an action for arresting the plaintiff.

*Quære*, whether the question of reasonable charge is one for the Court or the jury. *Hogg v. Ward*,  
417

## CONTRACT.

*See* BUILDING CONTRACT.  
CARRIER.  
CORPORATION.

## CONVICTION.

*See* MASTER AND SERVANT, (2).

## COPYHOLD.

*Fine*.

The surrenderee of a remainder in a copyhold estate having died in the lifetime of the tenant for life.—*Held*, that on the decease of the tenant for life the heir of such surrenderee was entitled to be admitted on payment of a single fine. *Garland v. Alston*,  
390

## COPYRIGHT.

*See* REGISTRATION OF DESIGNS  
ACT.

## CORPORATION.

(1.) *Validity of Contracts.*

Generally speaking corporations are as much bound by their contracts as individuals, where the seal is affixed in a manner binding on them; and where a corporation is created by act of parliament for particular purposes, with special powers, their contract will bind them unless it appears by the express provisions of the statute creating the corporation, or by necessary and reasonable inference from its enactments that the contract was *ultra vires*; or that the legislature meant that such a contract should not be made. *Per totam curiam*.

A Company was incorporated by act of parliament for the supply of a certain district with water from certain sources within that district; and empowered to break up highways and place pipes within the district, and to do all other acts which the Company should deem necessary for supplying water to the inhabitants according to the true intent of the Act, and penalties were imposed on the Company not supplying water to the inhabitants of dwelling-houses within the district. The members of the Company were entitled to the net profits to be divided amongst them, except the surplus above 7 per cent., which was to go in the reduction of the water rents. In consequence of the increase of population the supply of water within the district became insufficient both in quantity and quality. The Company employed an engineer, who reported that a sufficient supply could not be obtained from existing sources, and recommended that a supply should be obtained from a brook beyond the district, which would be sufficient

not only for the district but also for some adjoining populous villages. The Company then determined to apply to parliament for powers to enlarge their works so as to make the brook available for the entire district which it was capable of supplying, and to increase their capital from 15,000*l.* to 90,000*l.*—*Held*, that the Company might lawfully take steps to apply to parliament for such extension of the undertaking, it being for the benefit of the corporate body; and that the contracts made by the Company for the supply of plans, &c., essential to the application to parliament, were not necessarily illegal or void, or otherwise incapable of being enforced against the Company in a Court of law. Dissentiente *Bramwell*, B. *Bateman v. The Mayor, Aldermen and Burgesses of the Borough of Ashton-under-Lyne*, 823

(2.) *Covenant by Municipal Corporation to repay Money borrowed after 5 & 6 Wm. 4, c. 76.*

A covenant by a municipal corporation to repay money borrowed by them after the passing of the 5 & 6 Wm. 4, c. 76, is valid, although the money was not borrowed for any of the purposes to which the borough fund is applicable by the 92nd section of that Act; and although the covenant is contained in a mortgage deed made without the approbation of the Lords of the Treasury, as required by the 94th section. *Payne v. The Mayor, Aldermen and Burgesses of Brecon*, 572

COSTS.

See LANDS CLAUSES CONSOLIDATION ACT, 1845.  
SOLICITOR.

(1.) *On Application to Stay Proceedings on Payment of a Certain Sum and Costs.*

Upon a summons to stay proceedings on payment of a certain sum and costs, if the plaintiff refuses to take the amount offered in discharge of his claim, but afterwards accepts it, there is no absolute rule which entitles the defendant to his costs incurred subsequently to the summons.

*Semble*, that in such case if the defendant's answer to the plaintiff's claim consists partly of a set-off, the plaintiff is entitled to his costs to the time of pleading, unless the defendant has offered to allow the set-off. *Walton and Others v. Brown*, 879

(2.) *Stay of Proceedings in Second Action.*

An action of ejectment having been brought by a son claiming as heir through his father, who was alleged to be dead, and a verdict having passed for the defendant, the father, who was shewn to have been aware of the former action, but to have kept out of the way to prevent his son from being nonsuited, brought a second action to recover the same premises. The Court stayed the proceedings till the costs of the former action were paid. *Isaac Morgan v. Nicholl*, 215

(3.) *Witnesses.*

After public notice that common jury causes in London would be taken on the 18th of February, on the 12th a fresh notice was issued that they would be taken on the 16th. A cause, in which the plaintiff, his attorney and witnesses, resided in the country at a great distance from London, having been

put in the list for the 15th, was called on in its turn, and the witnesses not being in attendance was referred. The witnesses arrived in the evening after the Court had risen. The arbitrator having awarded in favour of the plaintiff:—*Held*, that, on taxation, the Master was at liberty to allow the plaintiff the costs of his witnesses as costs in the cause. *Standeven v. Murgatroyd*, 570

(4.) *Judgment for 20l. on Bond Conditioned for Payment of 12l.*

Judgment having been given for the plaintiff in an action on a bond in the penal sum of 20l., conditioned for the payment of 12l.:—*Held*, that the plaintiff was deprived of costs by the 13 & 14 Vict. c. 61, s. 11, on the ground, first, that the nominal damages did not make the sum recovered exceed 20l.; and secondly, per *Pollock*, C. B., and *Watson*, B., that the sum recovered within the meaning of that section was 12l. only. *Gowens v. Moore*, 540

COUNTY COURT.

See COMMON LAW PROCEDURE ACT, 1854, (5).

(1.) *Refusal of Judge to hear Interpleader Summons.*

A County Court Judge having refused to hear an interpleader summons, and ordered money to be paid out of court, with costs to be paid by the claimant, on the ground of the insufficiency of the particulars, a rule was obtained, under the 19 & 20 Vict. c. 108, s. 43, calling on the County Court judge to hear the summons. No cause being shewn the Court made the rule absolute; ordering the costs of the rule to abide the event of the interpleader

issue, and discharging the claimant from the costs in the Court below. *In the matter of an Interpleader issue in the County Court of Yorkshire at Great Driffield, in a Plaint between J. Whitehead and J. A. Procter, and T. Sleight, Claimant*, 532

(2.) *Refusal of Judge to sign Appeal.*

Judgment having been given in a County Court the plaintiff proposed to appeal. In consequence of delays in settling it, the case on appeal as agreed to by both parties, was not presented to the judge for his signature till nearly six months after the day when judgment was given. No security for costs of the appeal had been given. The judge refused to sign the appeal case. Thereupon a summons was issued by a Judge at Chambers, in pursuance of 19 & 20 Vict. c. 108, s. 43, to compel him to do so; but no affidavit of the facts was sworn till two days after the summons issued. On the hearing of the summons the County Court judge did not attend, and an order was made that he should sign the case. The order having been served upon him and disobeyed:—*Held*, first, that, assuming that the summons ought not to have issued except on an affidavit, the want of such affidavit was an irregularity only.

Secondly, that after the order had been served and disobeyed and the rule for an attachment obtained, it was too late for the County Court judge to object that the case was incorrectly stated, or that the summons had issued improperly, and a rule obtained by the County Court judge to set aside the Judge's order on these grounds was discharged with costs.

Also, that, upon the facts, the order that the County Court judge should sign the case was rightly



made. *In the Matter of an Appeal in the Clerkenwell County Court in an Interpleader between O. Furber, Plaintiff and Claimant, and G. J. Sturmoyn, Defendant and Execution Creditor,* 521

(8). *Thing done in pursuance of Act, 9 & 10 Vict. c. 95—Protection of Bailiff.*

The Bailiff of a County Court who, acting *bonâ fide*, has by mistake seized the goods of one person under a County Court execution against another, is entitled to the protection of the 138th section of the 9 & 10 Vict. c. 95, as in respect of a thing "done in pursuance of the Act."

Dissentiente *Martin, B. William Burling v. Harley and Plator,* 271

## COVENANT.

See CORPORATION, (2).  
INCOME TAX, (2).

### Condition Precedent.

By indenture the plaintiff covenanted with the defendant to deliver up a farm on a certain day, and in the mean time to cultivate it on the four-course system, and that on the surrender he would deliver up an agreement to be cancelled, and would surrender all his unexpired term and interest in the farm, and if the defendant required he would at any time afterwards execute any deed for further assurance. And the defendant covenanted that if the plaintiff did deliver up the farm, and in the mean time cultivate the farm on the four-course system, and perform and keep all and singular other covenants, the defendant would upon the delivering up of the farm pay for the manure, &c.;—*Held*, that the

## DECLARATION.

delivering up of the agreement was not a condition precedent to the plaintiff's right to sue on the covenant to pay for the manure. *Newson v. Smythies,* 840

## CUSTOMS ACTS.

See INFORMATION.

## DAMAGE.

See CANAL.

DISTRESS, (1).

LIBEL, (2).

PRINCIPAL AND AGENT, (1).

*In Action on 9 & 10 Vict. c. 93.*

In an action on the 9 & 10 Vict. c. 93, for injury resulting from death, the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life.

In an action by a father for injury resulting from the death of his son, it appeared that the father was old and infirm, that the son, who was young and earning good wages, assisted his father in some work for which the father was paid 3s. 6d. a week. The jury having found that the father had a reasonable expectation of benefit from the continuance of his son's life:—*Held*, that the action was maintainable. *George Franklin, Administrator of Thomas Franklin, deceased, v. The South Eastern Railway Company,* 211

## DEAN AND CHAPTER.

See LEASE.

## DECLARATION.

See LIBEL, (1).

## DEED OF ARRANGEMENT.

*See* BANKRUPT, (1).

## DILAPIDATIONS.

*See* COMMON LAW PROCEDURE ACT  
1854, (5).

## DEMURRAGE.

*See* CHARTER PARTY, (2).

## DETAINDER.

*See* SHERIFF, (4).

## DETINUE.

*See* MORTGAGE, (2).

## DEVISE.

*See* LEGACY DUTY.

## DISCLAIMER.

*See* LEGACY DUTY, (1).

## DISTRESS.

(1). *Selling goods distrained before the expiration of five days—Excessive Distress—Amendment.*

In an action for selling goods distrained before the expiration of five days, the plaintiff is not entitled to a verdict unless he proves actual damage.

*Quære*, whether under a count for taking an excessive distress under the statute of Marlbridge, the plaintiff can shew that the amount of rent due was less than that distrained for.

In an action for an excessive distress not averring that the sum distrained for was not due, with a count for selling before the expiration of five days, the plaintiff at the trial

applied to amend by adding a count for distraining and selling goods to satisfy more rent than was due. The Judge refused to allow the amendment on the ground that it was not a matter in dispute at the time of the commencement of the action.—*Held*, that the amendment was properly disallowed. *Lucas v. Turlston*, 116

(2). *Second Distress, when distrainee has by his misconduct prevented the first from being realized.*

The defendants, Commissioners for draining certain lands, distrained a bean stack of the plaintiff for a rate due from him, and sold the stack by auction, one of the condition of sale being that the purchaser was to take possession and pay for the same at the fall of the hammer. At the time of the sale the plaintiff said that "it would be one thing to buy the stack and another to take it away," and when the purchaser attempted to remove the stack from the plaintiff's premises, he was forcibly prevented by the plaintiff. The purchaser did not pay for the stack, and the Commissioners levied a second distress for the same rate.—*Held*, in the Exchequer Chamber (affirming the decision of the Court of Exchequer), that as the plaintiff by his own misconduct had prevented the Commissioners from realizing the first distress, the second was not unlawful. *Lee v. Cooke*, 208

## DOMICILE.

*See* INSURANCE.

*Declaration of Intention.*

A testator, a British born subject, resided for many years at Hamburg under circumstances which afforded evidence of a domicile there. He

came for a temporary purpose to England, where he made a will, in which he declared that it was not his intention to renounce his domicile of origin as an Englishman. He returned to Hamburgh where he died, having also made a will there: — *Held*, that the testator's declaration of intention could not prevail against the foreign domicile; and therefore that his personal property was not subject to legacy duty in England. *In the matter of the Estate and Effects of Edward Steer, deceased*, 584

## ECCLESIASTICAL LEASE.

*See* LEASE.

## EJECTMENT.

*See* COSTS, (2).

## EQUITABLE DEFENCE.

*See* GUARANTEE.

## ESTATE TAIL.

*See* SUCCESSION DUTY, (1), (2).

## EVIDENCE.

*See* BANKRUPT, (1).

BILL OF EXCHANGE, (5).

BILL OF SALE, (3).

CARRIER, (1).

PATENT.

PLEADING, (2).

SLANDER.

STATUTE OF LIMITATIONS.

## EXECUTION.

*See* BANKRUPT, (2).

COUNTY COURT, (3).

RAILWAY COMPANY, (1).

## GUARANTEE.

## FALSE IMPRISONMENT.

*See* PLEADING, (2).

## FEME COVERT.

*See* HUSBAND AND WIFE.

## FLOORING.

*See* BUILDING CONTRACT.

## FOREIGN JUDGMENT.

*See* INSURANCE.

## FRAUD.

*See* INSURANCE.

## FREIGHT.

*See* CHARTER-PARTY, (1).

## GARNISHMENT.

*See* COMMON LAW PROCEDURE ACT, 1854, (3).

## GIFT.

*See* MORTGAGE, (1).

## GREENWICH TIME.

*See* TIME.

## GUARANTEE.

*Against Losses in Trade.*

A declaration stated, that by an agreement between the plaintiff, a guarantee Company, and the defendants: after reciting that the defendants had delivered to the Company a declaration in writing containing a statement of the amount of their business and losses thereon during

the three years preceding, and that they were desirous of being guaranteed by the Company in respect of their future annual sales in their business, according to the deed of settlement of the Company and the rules and bye-laws thereof, and that the Company had agreed to enter into the guarantee thereafter contained upon the terms thereafter mentioned: It was agreed between the defendants and the Company, that if the defendants should pay the sums thereafter mentioned, and should comply with the provisions of the deed of settlement, &c., the subscribed funds of the Company should be liable to pay the defendants nine-tenths of their losses in respect of goods sold by them during the term of three years and one month from the 1st of December 1853, unto the 31st of December 1856, and during any further period the defendants should contribute to the funds of the Company and the Company should consent to receive further payments: but subject always to the provisions contained in the deed of settlement, &c., and *also to the provisions thereafter contained and indorsed thereon.* That one of the provisions indorsed by the plaintiffs on the agreement was, that every guarantee upon gross annual returns should, from the expiration of the original term, be treated as a renewed contract, unless either the member interested therein, or the board of directors, should give two calendar months' notice of an intention not to renew the same.—The declaration then alleged that the defendants agreed to pay the Company 43*l.* 15*s.* in each year during the term of the guarantee: that the agreement so made was a guarantee upon gross annual returns within the meaning of the provision indorsed on the policy, and that no

notice of an intention not to renew the guarantee had been given by either party; and alleged as a breach the nonpayment of an instalment of 43*l.* 15*s.*, being the annual premium for the year 1857, and 10*l.* 18*s.* 9*d.*, an instalment for the year 1858.—Pleas: first, that the sums are claimed in respect of periods after the 31st December, 1856, and that from and after such date the defendants refused to contribute to the funds of the Company. Secondly: that on the 31st December, 1856, by agreement between the plaintiffs and another Company, the plaintiffs' Company became dissolved and were amalgamated with that other Company, and the business, funds and property of the plaintiffs' Company were transferred to that other Company. Thirdly: for defence on equitable grounds, a plea stating an agreement to amalgamate, as in the second plea.

*Held*, that the first plea was bad, for the stipulation for notice was part of the contract; and no notice having been given the agreement continued for another three years.

Also, that the second and third pleas were bad; since it did not appear that the Company were not empowered by their deed of settlement to amalgamate. *The Solvency Mutual Guarantee Company v. York and Another*, 588

## HABEAS CORPUS.

*See* MASTER AND SERVANT (2).  
PRISONER.

## HORSE RACE.

### *Disqualification of Stewards.*

One of the conditions of a race was that "all disputes should be settled by the stewards, whose de-

cision should be final." There were four stewards, and a dispute having arisen as to whether the plaintiff's horse or the defendant's mare was the winner, three of the stewards voted in favour of the plaintiff's horse. One of the three had betted against the defendant's mare.—*Held*, that the steward was not disqualified from acting by reason of his pecuniary interest in the event of the race; and even assuming that he was, that did not annul the decision of the other stewards. *Ellis v. Hopper*, 768

## HOUSE.

*See* BUILDING CONTRACT.

## HUSBAND AND WIFE.

*Liability of Husband for Necessaries Supplied to Wife.*

During cohabitation, a wife has implied authority as agent of her husband to pledge his credit for necessaries suitable to her station, notwithstanding any private agreement between them.

If a husband turns his wife away and she is unable to maintain herself, she has an authority of necessity to pledge his credit for necessaries supplied to her.

*Sed quære*, whether, if a labouring man turns his wife away, she being capable of earning, and earning as much as he did: or if a man turned his wife away she having a settlement double his income in amount, the wife in such cases could bind the husband.

If a wife leaves her husband without his consent, she has no authority whatever to bind him.

Where husband and wife part by mutual consent, and nothing is said, and she cannot maintain herself, a

jury may infer that the husband meant that his credit should be pledged: and *semble*, even if at parting he said otherwise.

But where husband and wife part by mutual consent, and the wife is capable of supporting herself or has a sufficient allowance, the burden of proof is on the person who has trusted the wife to shew an authority either express or implied to pledge her husband's credit.

A husband and wife separated by mutual consent when it was verbally agreed that the wife should continue to receive 200*l.* a year, which had been settled on her on the marriage.—*Held*, that the husband was not liable for necessaries supplied to his wife, the plaintiff having failed to shew that her allowance was insufficient, or that she had any authority to pledge her husband's credit. *Johnston v. Sumner*, 261

## INCOME TAX.

*See* SUCCESSION DUTY, (3).

## (1). Annuity.

By a marriage settlement, executed in 1807, certain lands were conveyed, subject to "an annuity or clear yearly sum of 100*l.*, freed and clear and without any deduction or abatement whatsoever in respect of any taxes or impositions then already or which should thereafter be taxed, charged, assessed or imposed upon the said premises, or upon the said annuity by authority of parliament or otherwise howsoever."—*Held*, that the parties paying the annuity were entitled to deduct income tax under the 5 & 6 Vict. c. 35, ss. 103, 73, and that the annuitant, refusing to permit the deduction, was liable to the penalty under section 103. *The Attorney General v. Shield*, 834

(2). *Purchase Money of Estate Payable by Instalments.*

F., being seised in fee of one moiety of certain mines, sold her share for 45,000*l.*, payable 3,385*l.* down and the residue by half-yearly instalments of 768*l.* 11*s.* 8*d.* during a period of thirty years:—*Held*, first, that the purchaser was not empowered, by 16 & 17 Vict. c. 34, s. 40, to deduct income tax from the instalments.

Secondly: that the instalments were not chargeable with income tax under the words "annuities or other annual profits and gains" in Schedule (D.) of the 16 & 17 Vict. c. 34; or under the words "annual payments, payable as a personal debt or obligation, by virtue of any contract," in the 5 & 6 Vict. c. 35, s. 102, such instalments being the payment of a debt, and not being profits and gains, and therefore not within the purview of the Acts.

A declaration stated, that the defendants by indenture covenanted with plaintiff to pay her certain monies by the several instalments and at the several times, and *subject to the provisoes* and agreements, and in manner thereafter expressed; viz. the sum of 768*l.* on every 24th day of December in each year, until, &c.; and in case either of the instalments of 768*l.* should not be paid upon the day appointed for payment, or within one calendar month next after the same day, then the defendant should upon demand pay to the plaintiff interest upon the instalment, to be computed from the 24th of December. Breach: that though the 24th of December had elapsed the defendant had not paid an instalment. Plea.—That by the indenture it was provided, that no instalment, payable under the covenants therein contained, should be recoverable or

capable of being enforced, nor should any proceeding for that purpose be commenced, till after the expiration of one calendar month from the day when the same should become payable under the covenant; nor should any interest become payable in respect thereof till the expiration of such calendar month from such day, and that one calendar month from the day on which the instalment became payable had not expired before suit:—*Held*, that the covenant was qualified by the proviso, and that the plea was good. *Lady Emily Foley v. Fletcher and Rose*, 769

## INFORMATION.

*Misjoinder of Counts—Judgment.*

An information under the Customs Acts, charged, in the first three counts, four defendants with several offences on several days; in the fourth, fifth, sixth and seventh counts, it charged four of those defendants, together with four others, with similar offences on other days. A verdict having been found for the Crown against different defendants on different counts, the Attorney General entered a nolle prosequi as to all the counts except the fourth, upon which six of the defendants were convicted and two acquitted; and judgment was entered up for the penalty and costs against each defendant accordingly. A writ of error having been brought:—*Held*, that the judgment was not erroneous. *Ruck and Others v. The Attorney General*, 208

## INSURANCE.

*See CHARTER PARTY.*

## GUARANTEE.

JOINT STOCK COMPANY, (5).  
PRINCIPAL AND AGENT, (2).

*Abandonment—Sale—Foreign Judgment.*

Trover for deals. Pleas: not guilty: not possessed. The plaintiffs were the underwriters on a cargo of deals, valued in the policy at 1,100*l.*, shipped on board the Prussian vessel "Augusta Bertha," from Onega to Messrs. S. at Hull. On the 17th of September the vessel struck on the rocks on the coast of Norway. On the 4th of October Messrs. S. gave notice of abandonment of the cargo as totally lost. The plaintiffs accepted the abandonment and paid as for a total loss. On the 23rd of September the master had written to inform the owners of the cargo of the loss of the vessel. Before receiving an answer, the master and his agent took steps to cause an act of survey of the vessel and cargo to be held. On the 27th of September the surveyors recommended, as best for all parties, that the vessel and cargo should be sold. At that time the cargo had been safely landed. The master and his agent then applied to an officer, called the sheriff and director of auctions, to appoint a day for the sale, which, in pursuance of such appointment, took place on the 15th of October. At the sale one J., the agent of the underwriters, publicly protested against the sale, but the officer presiding, deeming the proof of his authority insufficient, decided that the sale should proceed. The act of survey and public auction are judicial proceedings from which, by the law of Norway, appeals lie. J., as agent for the underwriters, then instituted in the superior Court in Norway a suit against the master, his agent and the purchaser of the cargo, praying that the public auction should be disavowed, and that the purchaser should be compelled to

deliver up the goods in specie: in November, 1853, judgment was given that the auction should be confirmed. The deals were forwarded by the purchaser to the defendants in London who had made advances upon them, and who refused to deliver them up to the plaintiffs on a demand by them in April 1853. The deals realized 1,470*l.* There was evidence that, by the law of Norway, a sale by the master would transfer the property in the cargo.

*Held:* first, that, notwithstanding the abandonment, as there was no necessity to justify a sale, if the case had rested on the law of England or the general maritime law the purchaser would have gained no title as against the owners.

Secondly: that upon the acceptance of the abandonment by the underwriters their title to the cargo had relation back to the time of the alleged loss; and, therefore, that the plaintiffs might maintain trover, though the sale was before the acceptance of the abandonment.

Thirdly: that such title was a title to the cargo itself in the state in which it was at the time of the loss, and not to the price only for which it had been sold in Norway.

Fourthly: that the propriety of the abandonment was a question solely between the insured and the underwriters, with which the purchaser of the cargo had nothing to do.

Fifthly, that the plaintiffs were concluded by the judgment of the Court in Norway that the sale was valid.

*Semble*, that the judgment was one *in rem* which finally decided the question as to the status of the property.

But *Held*, sixthly, that, assuming the judgment to be *in rem*, it was not necessary to plead it; and that

it was conclusive evidence on the plea that the goods were not the goods of the plaintiffs.

Seventhly, assuming the judgment not to be *in rem*, that because the plaintiffs had sought their remedy in a foreign court of competent jurisdiction, they were conclusively bound by the judgment of such court.

Eighthly: that such judgment could only be impeached on the ground of fraud in the Court or in the procuring of the judgment, and not on the ground of any fraud of the defendants in that suit.

Lastly, that it was not material that the judgment was given after the conversion.

*Quere*, whether the validity of the sale should have been decided according to the law of Norway or the law of the domicile of the owner of the goods. *Campbell and Others v. Sewell and others*, 617

## INTEREST.

*See* BOND.

## INTERROGATORIES.

*See* COMMON LAW PROCEDURE ACT, 1854, (1).

## INTERPLEADER.

*See* COUNTY COURT, (1).

## JOINT STOCK COMPANY.

*See* BILL OF EXCHANGE, (2).  
CORPORATION, (1).  
GUARANTY.  
JURY.

(1.) *Memorandum of Association—Articles of Association.*

Under "The Joint Stock Companies Act, 1856," a printed copy of the memorandum of association or

articles of association may be signed by a subscriber before the original is signed or registered in pursuance of the 3rd section of that Act; and such signature of the subscriber is an authority for placing his name on the register of shareholders. Therefore where a defendant, having applied for shares in a proposed Company and paid the deposit, signed a printed form of memorandum of association, and by the articles of association agreed to accept certain shares allotted to him; and some weeks afterwards the original memorandum of association and articles of association were signed and registered, and the defendant's name was placed on the register of shareholders.—*Held*, that the defendant was a shareholder in the Company and liable for calls. *The New Brunswick and Canada Railway and Land Company (Limited) v. Boore*, 249

(2.) *Default in Registering.*

The 27th section of "The Joint Stock Companies Act, 1857," which requires every Company registered under the 7 & 8 Vict. c. 110, "but excluding any Company formed for the purpose of insurance," to register under the Joint Stock Companies Acts, 1856, 1857, on or before the 2nd November, 1857, only exempts from such registration Companies formed for the purpose of insurance only. Therefore where a Company completely registered under the 7 & 8 Vict. c. 110, formed for the purpose and carrying on the business of insurance and also the lending of money, made default in registering under those Acts:—*Held*, that by the 27th section of The Joint Stock Companies Act, 1857, such Company was incapable of suing at law or in equity. *The London Mone-*



*tary Advance and Life Assurance Company (Registered) v. Smith*, 543

(3). *Acceptance of Bills of Exchange.*

A bill drawn on the R. S. G. Company, Limited, by a shareholder in that Company, was accepted—"W. Ellis, secretary, by order of the R. S. G. Company, Limited." This acceptance was in fact written by order of certain directors of the Company. At the time when the bill became due the Company was insolvent. In an action by a second indorsee of the bill, (who did not shew that either he or the first indorsee had given value to the drawer,) against the directors, who authorized the acceptance, alleging in one count that they accepted the bill, and in another charging them with falsely representing that they had authority on behalf of the Company to accept it:—*Held*, first, that the defendants were not liable as acceptors. Secondly, that, assuming there had been a false representation, the plaintiff not having proved that he thereby sustained damage, the defendant was entitled to a verdict. *Eastwood and Another v. Bain and Others*, 738

(4). *Promissory Note signed by three Directors.*

The following promissory note was signed by three persons describing themselves as "directors" of a Joint Stock Company, incorporated with limited liability, under the 19 & 20 Vict. c. 47, and was countersigned by one G., who described himself as secretary of the Company. "London, Dec. 31, 1856. Three months after date we jointly promise to pay S. or order six hundred pounds for value received in stock on account of the L. and B. Company, Limited."—*Held*, in the Exchequer Chamber,

(affirming the judgment of the Court of Exchequer), that the directors who signed it were not personally liable upon the note.—*Dubitantibus Crompton, J., and Willes, J. Lindus v. Melrose and Others*, 177

(5). *Policies of Marine Insurance granted by Directors of Fire Insurance Company.*

"The Hull and London Fire Insurance Company" was a Company completely registered under the 7 & 8 Vict. c. 110. The deed of settlement gave the Company power (inter alia) to transact all the branches of business usually appertaining to marine insurance, and required that in every policy the funds of the Company should alone be made liable. The Company had a seal with their name of incorporation on it. For marine insurances the directors appointed an agent to issue policies. The marine policies were headed "Hull and London Marine Assurance Company," and were signed by the agent, by order of the Board of directors of the said Company, and had a stamp upon them with the words "Hull and London Marine Assurance Company." They contained no stipulation that the funds of the Company should alone be liable:—*Held*, first, that the "Hull and London Fire Insurance Company" were not liable on such policies, because neither the directors, nor any one else, had authority to enter into such engagements on behalf of the Company, as these policies purported to create; and there neither was nor could be any evidence that the signing of such policies by an agent in a name not that of the Company was in accordance with the usual mode of conducting the business of partnerships such as the defendants; or within the scope of the ordinary authority of

the directors or agents of such Companies. Secondly, that no action lay against "The Hull and London Fire Insurance Company" on an adjustment of losses on such policies by the directors. *Hambro' and Others v. the Official Manager of the Hull and London Fire Insurance Company*, 789

## JUDGMENT.

*See* INFORMATION.

## JURY.

Where a public Company is a party to an action, the mere fact that one of the jurymen was a shareholder in the Company is no ground for granting a new trial. *Williams v. The Great Western Railway Company*, 869

## LANDLORD AND TENANT.

*See* DISTRESS.

*Right of Tenant to Deduct Rates.*

The 35 Geo. 3, c. 73, s. 179, empowers the vestrymen of Marylebone to make rates, &c., upon persons who shall occupy, &c., any land, &c., according to the yearly rent, &c., to be entered in a book in which there are to be separate columns, one for the arrears and another for the names of the persons charged. By s. 187, where houses are let in parts, &c., the lessor or lessee shall respectively be deemed the occupier, and liable to the payment of rates according to such proportion of the yearly rent. By s. 188, every person occupying any such part shall be liable to the payment of the said rates, and the occupiers who shall pay such rates shall deduct the same out of the next rent. A tenant of part of a house in the parish of Marylebone, having

paid rates which had been made on the occupier of another part who had quitted the premises:—*Held*, that he was not entitled to deduct them as against a landlord whose title had not accrued until after the person rated had quitted the premises.

*Semble*, that by the Act in question, in the case of houses let in apartments, the rate must be made either on the landlord in respect of his entire interest, or upon each tenant in respect of such portion of the premises as he occupies. *Lobban v. Cook*, 238

## LANDS CLAUSES CONSOLIDATION ACT, 1845.

*Costs of Arbitration to settle Compensation.*

A person claiming compensation under a Water-works Act, which incorporated the Lands Clauses Consolidation Act, 1845, agreed with the Company to appoint as sole arbitrator, for the purpose of settling the amount of such compensation, a person to be nominated by two others. They accordingly nominated an arbitrator who awarded to the claimant a sum exceeding 50*l*.—*Held*, that the claimant was entitled to the costs of the arbitration although no offer had been made by the Company, or the other preliminaries mentioned in the statute complied with. *Martin v. the Leicester Waterworks Company*, 463

## LEASE.

*See* POWER, (1).

*By Dean and Chapter.*

Leases granted by deans and chapters for long terms of years, not in conformity with the disabling and restraining statutes, are not void but voidable only.

P., a lessee, being in possession, and the dean and chapter of C. being possessed of the reversion expectant upon his term, of the manor of W., in June 1786 granted certain building leases for 99 years, from Michaelmas 1786, of certain premises, part of the manor, at several yearly rents of 14*l.*, payable to the dean and chapter and P. respectively. Rent was regularly paid to and accepted by successive deans down to 1856. In 1849, on the surrender by the plaintiffs of the existing lease of the manor, the dean and chapter re-demised the manor for 21 years to the plaintiffs, "except and reserved out of this demise unto the said dean and chapter and their successors, all such *rents* and sums of money and other right and interest, benefit and advantage, which hath been or are, or shall be reserved to them in and by any building leases for long terms of years of any part of the several lands and tenements hereby demised," &c., "to have, hold, occupy and enjoy the site and courtlodge and all other the premises with the appurtenances, except as before excepted, and subject to the building leases."—*Held*, that the demise to plaintiffs was subject to all leases *de facto* granted, and that the plaintiffs did not acquire any right to avoid the building lease of 1786.

*Seemle*, that the premises comprised in the building lease of 1786 were excepted out of the lease of 1849. *Pennington and Others v. Cardale and Others*, 656

of 7,487*l.* upon trust for D.'s daughter, the wife of B., during her life, and provided she died without issue, he bequeathed the same to B., his heirs and assigns. B. by his will bequeathed the said and all his other personal estate to S. and the defendant, upon trust to pay debts and legacies, and as to the residue in trust for such purposes as his wife should by her will appoint, and in default of such appointment, in trust for her executors and administrators. B. appointed S. and the defendant executors of his will, and died, leaving his wife him surviving. After the death of B. his wife appointed the defendant with two other persons trustees of the will of D. in the place of W., and all the personal estate of D. was assigned by D. to them. The wife of B. appointed the defendant, with the two last mentioned persons, executors of her will, and bequeathed to them the whole of her personal property on certain trusts. She died without ever having had issue, and more than two years after her death S. and the defendant, on being applied to for payment of legacy duty on the above sum of 7,487*l.*, by a certain writing, signed by them, reciting the bequest by D. to B., professed to disclaim and renounce such bequest.—*Held*, that it was not competent for the defendant to disclaim the bequest after B. had accepted and bequeathed it, and that the defendant was liable as executor of B. to pay a legacy duty of 10*l.* per cent. *The Attorney General v. Munby*, 826

## LEGACY DUTY.

### *See DOMICILE.*

#### (1). *Disclaimer.*

D. by his will bequeathed to W. certain personal estate of the value

#### (2). *Words of Reference in Will incorporating Trusts of Settlement.*

A. P., on the marriage of his daughter I. B., covenanted to pay to the trustees of the settlement then made, as a provision for his daughter

on her marriage, 2000*l*. The trusts were to pay the income to I. B. for life, and after her death to her husband for life, and after the decease of the survivor to the children, and if there should be no child then to such person as she should appoint, and in default of appointment then to her next of kin; and in the same settlement he covenanted that his executors should pay the further sum of 2000*l*. to the trustees, to be held upon the same trusts, within six months after his decease. On the marriage of his daughter, E. B., he covenanted to pay to the trustees of the settlement then made 2000*l*. within one month after the marriage. The trusts of this sum were to pay the income to G. B., the husband of E. B., for his life, and after his death to E. B. for her life, and after the death of the survivor to the children, and if there should be no child then to such person as E. B. should appoint, and in default of appointment to her next of kin. By his will the testator directed "that the covenants on his part contained in the settlements made on the marriage of his daughters, for the payment of monies and annuities for the benefit of themselves and their respective children and grandchildren as therein stated, should be performed;" and proceeded as follows:—"In addition to the property settled by my daughter I. B.'s marriage settlement, I give the further sum of 8000*l*. to the trustees, &c., to be held, &c., upon the same trusts in all respects, for the benefit of my daughter I. B. and her children, as thereby declared as to the property thereby settled; and in addition to the property settled by my daughter E. B.'s marriage settlement I give the further sum of 8000*l*. to the trustees of such settlement, to be held upon the same trusts in all respects, for the benefit

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of my daughter E. B. and her children and grandchildren, as thereby declared as to the property thereby settled.—*Held*, that the words "to be held, &c., upon the same trusts in all respects for the benefit of my daughter and her children and grandchildren, as thereby declared as to the property thereby settled," were to be construed as words of reference, incorporating the trusts of the settlements in the will; that the trusts for the husbands were not excluded, and therefore that legacy duty was payable upon that principle. *In re Arthur Palmer*, 26

## LIBEL.

See SLANDER.

(1). *Refusal of Music and Dancing Licence.*

The declaration alleged that, the plaintiff being the proprietor of certain rooms adapted for a dancing academy, the defendant falsely and maliciously published of the building and rooms, and of the plaintiff as proprietor thereof, that "the magistrates in quarter sessions having refused to renew a music and dancing licence to the proprietor, all such entertainments there carried on are illegal, and the proprietor renders himself thereby indictable for keeping a disorderly house, and every person found on the premises will be apprehended and dealt with according to law," by means of which premises the plaintiff was prevented from letting the rooms.—*Held*, on demurrer, that the declaration was good. *Bignell v. Buzzard*, 217

(2). *Apology.*

To an action for libel in a newspaper, the defendant pleaded, under the 6 & 7 Vict. c. 96, s. 2, that the

libel was inserted without malice and without gross negligence, and that he inserted a full apology: and he paid 40s. into Court. The apology was inserted in small type amongst the notices to correspondents. The jury found that the apology was sufficient in its terms but that the type should have been larger, and that the apology should have been inserted in a more prominent part of the newspaper: that the 40s. paid into Court was sufficient to cover the actual damage: that there was no malice and no positive negligence.—*Held*, that on this finding the plaintiff was entitled to a verdict with nominal damages. *Lafone v. Smith and others*, 735

### LICENSED VICTUALLER.

#### *Time of Selling Beer on Sunday.*

The provision in the licence to a victualler, granted under the 9 Geo. 4, c. 61, "that he shall not keep open his house, nor suffer any beer or other exciseable liquor to be conveyed from his premises during the usual hours of *afternoon Divine service* on Sundays," is impliedly repealed by subsequent statutes, and the law now in force is the 18 & 19 Vict. c. 118, which prohibits the sale of beer, wine, or spirits on Sundays, between the hours of *three and five o'clock*, and after eleven in the afternoon. *Regina v. Whiteley*, 148

### LIEN.

#### *See CHARTER-PARTY, (1).*

### LIVERPOOL DOCKS.

#### *Liability of Trustees.*

The Trustees of the Liverpool Docks are a corporation receiving

tolls and port duties for the purpose of discharging a public duty, from which members derive no emolument; and they have a discretion as to the application of the funds and as to the time and manner in which they will repair the docks. A declaration against the trustees alleged, first, that they were the proprietors of a certain dock, which was made by them under the powers of the 7 & 8 Vict. c. lxxx., and that under that Act and other Acts they received from vessels certain tolls, which under the said Acts they were bound, and it was their duty to apply in and about (amongst other things) the maintaining, cleansing, and supporting the dock so as to be in a fit state for vessels entering and navigating the same.—Averment: that the funds in the hands of the defendants arising from the said tolls were fully sufficient for maintaining, cleansing, and supporting the dock, in addition to the satisfaction and discharge of all other liabilities and incumbrances in and about the same.—Breach: that the defendants did not take reasonable or any care in or about maintaining, &c., the dock, insomuch that the plaintiff's vessel in endeavouring to enter, struck on the mud, which, by the negligence of the defendants, lay at the entrance of the dock, and in consequence thereof the cargo was damaged.—The second count alleged that the defendants well knowing that the dock and the entrance thereto were, by reason of accumulated mud, in an unfit state to be navigated and used by vessels then accustomed to navigate and use the same, did not take reasonable or any care to put the same into a fit state for that purpose; but negligently permitted the dock and the entrance thereof to continue, while the same was by their permission navigated and used by such

vessels, in an unfit state for want of reasonable cleansing, insomuch that the vessel in question, being such vessel as was used and accustomed to navigate the dock, in endeavouring to enter struck against the bed of mud and was damaged together with the cargo. On demurrer to the declaration.—*Held*, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the defendants were liable, since though it might be doubted whether the declaration did not disclose a state of facts under which they had a positive duty to perform, and not merely a discretion to exercise, as to removing the danger; at all events if they had a discretion, under the circumstances, to let the danger continue, they ought as soon as they knew of it to have closed the dock to the public; and they had no right with a knowledge of its dangerous condition to keep it open and invite the vessel in question into the peril which they knew it must encounter, by continuing to hold out to the public that any ship, on payment of the tolls, might enter and navigate the dock.

Also that under such circumstances, the duty is equally cast on those who have the receipt of the tolls and management of the dock, whether the tolls are received for a beneficial or a fiduciary purpose. *Gibbs and Others v. The Trustees of the Liverpool Docks*, 164

# MARYLEBONE ACT.

(35 GEO. 3, c. 73.)

See LANDLORD AND TENANT.

# MASTER AND SERVANT.

- (1). *Liability of Master for Injury to his Servant.*

Declaration that defendant was possessed of a granary and ladder leading up to it; that the ladder was wholly unfit and unsafe for use; that the plaintiff was a servant for hire of the defendant; that the defendant knowing the premises wrongfully and deceitfully ordered the plaintiff to carry corn up the ladder into the granary; that the defendant believing the ladder to be fit for use, and not knowing the contrary, did carry corn up the ladder to the granary, and by reason of the ladder being unsafe the plaintiff fell from it.—*Held*, on demurrer, that the declaration was sufficient.

*Seem*, that if the plaintiff had the means of knowing that the ladder was unsafe it would have been a defence, but the defendant should have pleaded it. *Williams v. Clough*, 258

Plaintiff, a workman, employed with others in sinking a pit, being at the bottom, was injured by the fall of a tub of water which was being drawn up by machinery. Evidence was given that the tackle was improper, not being fitted with a safe hook, and that a jiddy should have been used. The plaintiff worked with the hook making no complaint of it. A jiddy had been provided by the master, who had directed that it should be used when earth was raised. The plaintiff, in his master's presence, had complained that the jiddy was not used for water. The master was at the workings several times each day.—*Held*, that the master was not liable; first, because, assuming the injury to have arisen from the defect of the hook, the workman himself voluntarily used it, and it was not shewn that the injury was not caused by his own rashness. Secondly, because, assuming it to have arisen from the neglect to use

the jiddy, the master, having provided a proper apparatus, was not liable for the neglect of the plaintiff's fellow workmen in omitting to use it. *Griffiths v. Gidlow*, 648

(2). *Aiding and Abetting the Commission of an Offence, under the 4 Geo. 4, c. 34, s. 3.*

A writ of habeas corpus having issued directed to the keeper of a House of Correction in the borough of Kingston-upon-Hull to bring up S., a prisoner detained in his custody, the keeper made a return setting out a warrant of commitment by a magistrate of the borough, stating that S. did unlawfully aid and abet T., a handicraftsman, who had contracted in writing to serve H., a shipbuilder, in neglecting and refusing to commence his service with H. according to his contract. The return then stated that whilst S. was in the keeper's custody, the same magistrate delivered to him another warrant of commitment which stated that S. was duly convicted: for that T., a handicraftsman, did on &c., at the parish of Holy Trinity in the borough aforesaid, contract with H., a shipbuilder, to serve him in the capacity of a shipwright for a period not then expired, the said contract being in writing and signed by the contracting parties; and that T. did not then and there, or at any day since then, enter into his service according to his contract, and that he had not the consent of H. nor any lawful excuse for such his default in not entering into his service: and that S. before the committing of the offence by T. unlawfully did aid, abet, counsel, and procure T. the said offence in manner and form aforesaid to commit, that is to say, S. did then and there aid, abet, counsel,

and procure T. so as aforesaid not to enter his service according to the said contract:" and it was thereby adjudged that S. for his said offence should be imprisoned in the House of Correction in the said borough, &c.—The first warrant of commitment was bad on the face of it.

*Held*: First, that the defect in the first warrant was cured by the second, it appearing by the return that the second was substituted by the same magistrate as an amendment to the first.

Secondly, that the second warrant sufficiently stated that S. aided T., "knowing that he had not the consent of H. or any lawful excuse for not entering into his service."

Thirdly, that the warrant was not bad, because it stated that S. "did aid, abet, counsel, and procure," without stating of which offence he was convicted.

Fourthly, that an affidavit could not be received for the purpose of shewing that T. did not in fact contract within the borough, as stated in the warrant. *In re Charles Smith*, 227

MEMORANDA, 210, 322, 600, 902.

MERCHANT SHIPPING ACT.

*See* BANKRUPT (4).

*Definition of "Wreck."*

Timber found floating without an apparent owner at sea, having drifted from the place where it was moored in a river, is not "wreck" within the meaning of that word as defined by "The Merchant Shipping Act, 1854," s. 2.—*Held*, therefore, that persons who had secured such timber could not enforce a claim for salvage in respect of their services under

ss. 458, 460 of that Act. *Palmer v. Bouse and Others*, 505

## MINE.

See INCOME TAX (2).

POWER.

*Conveyance.*

S. D., being seised in fee of four closes of land under which were mines of coal, in June, 1805, mortgaged in fee the lands and mines to T. T. to secure 550*l.* and interest. S. D. by her will dated the 15th September, 1809, devised to her seven children, as tenants in common in fee, all the mines under the said lands, and all her real estates (except the said mines) to J. S., W. W. and W. D., their heirs and assigns, upon trust to sell the said real estates (except as before excepted). On the 26th December, 1812, S. D. demised to J. S. and W. W. two seams of the coal under the said lands for a term of fifty years at a rent of 105*l.* S. D. died in 1814, and the rent was paid to her seven children. T. T., the mortgagee, by his will, dated the 17th October, 1810, devised all freehold estates held by him in mortgage to J. H. and J. J., their heirs and assigns, and soon after died. By indentures of lease and release, the latter dated 10th June, 1815, between J. S., W. W. and W. D., devisees and trustees named in the will of S. D., of the first part, J. H. and J. J., trustees and executors named in the will of T. T., of the second part, J. T. (a mortgagee of other premises) of the third part, and B. K. of the fourth part: after reciting (*inter alia*) the mortgage by S. D. to T. T., and that J. S., W. W. and W. D., in execution of the trusts of the will of S. D., had put up for sale by auction the lands comprised

in the said mortgage, at which sale B. K. was declared the purchaser of the said lands (except the mines and beds of coal under the same) for the price of 1,149*l.* 15*s.*; it was witnessed that J. H. and J. J. (at the request and by the direction and appointment of J. S., W. W. and W. D.) did bargain, sell, release, &c., unto B. K. the said closes of land, "together with all and singular the out-houses, buildings, gardens, &c., waters, water courses, &c., *quarries*" (omitting the word "mines"), except and always reserved, unto the said J. S. and W. W. during the term of thirty years, all the mines and beds of coal under the said closes of land with liberty to dig and sink pits, &c., for working the coal: to hold the said closes of land (except as before excepted) unto the said B. K., his heirs and assigns for ever:—*Held*, by the Court of Exchequer Chamber, affirming the judgment of the Court of Exchequer, that the mines and seams of coal did not pass under the conveyance to B. K. *Denison v. Holiday and Others*, 670

## MORTGAGE.

See BANKRUPT (4).

CORPORATION (2).

MINE.

(1). *Gift of Railway Debentures.*

The 8 & 9 Vict. c. clv., s. 36, enacts, "that every transfer (of Bristol and Exeter Railway mortgages) shall be by deed duly stamped," &c. A., having in his lifetime given by word of mouth and delivery to B. two such mortgages or debentures.—*Held*, that, assuming the property in the mortgage debts did not pass by such gift, nevertheless that A.'s executor could not maintain *detinue*



for the documents against B. *Barton and Another, executors of Cox, v. Sarah Gainer,* 387

(2). *Right of Mortgagees to maintain Detinue for Title Deeds.*

L. conveyed to the plaintiff by way of mortgage certain land and deposited with him an indenture conveying the land from G. to T., and also a document purporting to be an indenture by which the land was conveyed by L. to L. This document was in fact a forgery. L. afterwards deposited with the defendants by way of equitable mortgage, a document purporting to be the conveyance from G. to T., but which was in fact a forgery, and also the genuine indenture of conveyance from T. to L.—*Held*, that the plaintiff might maintain detinue against the defendant for the recovery of the latter indenture. *Newton v. Beck, Public Officer of The North and South Wales Banking Company,* 220

NAVIGATION COMMISSIONERS.

*See* CANAL.

NEGLIGENCE.

*See* CHELTENHAM IMPROVEMENT ACT.

NOTICE.

*See* GUARANTEE. SHERIFF, (3).

PARTICULARS OF DEMAND.

*See* PRACTICE, (1).

PARTNERSHIP.

*See* ARBITRATION.

BILL OF EXCHANGE, (1).

*Right of one partner to bind others by borrowing Money and accepting Bills of Exchange.*

The defendants were partners for the purpose of working a coal mine. Two of them conducted the business of the colliery. The firm being in debt and two actions having been brought against them, the managing partners borrowed of the plaintiff, upon the credit of the firm, money for the purpose of settling these actions, and accepted in the name of the firm a bill of exchange drawn by him on them. The partnership deed contained a clause "that if any partner should for his own use, or for any other purpose than the immediate use of the partnership, draw, accept or indorse any bill of exchange in the name of the firm," the others might determine his interest in the partnership.—*Held*, that the managing partners had authority to bind the partnership by borrowing the money and accepting the bill. *Brown v. Kidger, Price, Bostock and Knight,* 853

PATENT.

*Imitation of Mark of Patentees.*

In an action for a penalty under the 5 & 6 Wm. 4, c. 83, s. 6, for putting on an article made according to a patent the words "K & G Patent Elastic," without the licence of the patentee, it is no defence "that the invention was not a new manufacture."

But it is necessary to prove that

such words did imitate, and were so put on by the defendant "with a view of imitating" the mark of the patentee. *Myers and Others v. Baker and Another*, 802

PLEADING.

See BAILOR AND BAILER.  
GUARANTER.

LIBEL.

MASTER AND SERVANT, (1).

WATER.

(1). *Several Matters.*

In an action by a banking Company, established under the 7 Geo. 4, c. 46, and suing as a Company registered under the 20 & 21 Vict. c. 48, s. 6, the Court allowed the defendant to plead, together with pleas going to the merits,—1st. Traverse, of registration of Company. 2. Traverse, that the Company was carrying on business as bankers until registration. 3. That before registration the Company had stopped payment and ceased to carry on business as bankers. 4. Nul tiel corporation. But the Court refused to allow the defendant also to plead—That before registration the Company had lost their reserve fund and more than one-fourth of their paid-up capital, whereby they ceased to carry on legally the business of bankers. *The Liverpool Borough Bank v. Mellor*, 551

(2). *Plea in Trespass for False Imprisonment.*

In trespass for false imprisonment, the defendant under the plea of "not guilty," may give in evidence the excuse, if it merely goes in mitigation of damages, though he cannot

do so without a special plea if it amounts to a justification. *Linford v. Lake*, 276

POOR RATE.

See BANKRUPT, (2).

POWER.

*Lease in Excess of Power.*

An indenture of settlement contained a power for the tenant for life to lease for lives the hereditaments to any person willing to build houses thereon: Also a power to lease for sixty-three years the coal mines under the lands "with all such powers, authorities, accommodations, liberties, and privileges as shall be necessary or are usually contained in leases of collieries or mines in the county, place, or neighbourhood where the collieries intended to be demised are or shall be situate, for seeking, winning, working, drawing, taking and carrying away the coals; so as the lessees be not made punishable for waste by any express words therein contained. In execution of this power the tenant for life granted a lease which contained a power for the lessee "to erect, build and construct, and set up in and upon the said mines, lands and premises, all such engine-houses, machine offices, counting-houses, warehouses, store-rooms, workshops, workmen's cottages, huts, &c., erections, buildings and accommodations as shall be bonâ fide necessary or proper for or in the due prosecution and carrying on of the said works." There was also a power to dig and use stones, slate, brick earth and materials in any part of the land which should be required for the

collieries or for any building thereby authorized to be made in the exercise of any power thereby granted. Ejectment having been brought to recover possession of the coal mines on the ground that the lease was not a due execution of the power, the jury found that a power to build cottages in places convenient with reference to the works was both necessary and usual in leases of collieries in the neighbourhood.—*Held*: First, that the lease was not in excess of the power.

Secondly, that the lease was not void on the ground that the power to build was in violation of the provision in the settlement that the lessees should not be made punishable for waste. *Sir John Morrice, Bart., and Lockwood v. The Rhydydefed Colliery Company*, 473

Also *Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer): first, that the lease was not in excess of the power.—Secondly, that the lease was not void on the ground that the power to build was in violation of the provision in the settlement that the lessees should not be made punishable for waste. *Sir John Morris, Bart., and Lockwood v. The Rhydydefed Colliery Company*, 885

## PRACTICE.

*See* COSTS, (1).

PRISONER.

SHERIFF, (2).

### (1). *Order for Particulars.*

In an action for an injury to the plaintiff by the careless driving of a servant of the defendants, the Court refused to make an order for particulars of the injury sustained by the plaintiff. *Wicks v. Macnamara and Others*, 568

## PRINCIPAL AND AGENT.

### (2). *Security for Costs.*

Where a defendant residing out of the jurisdiction, against whom a judgment had been obtained in this Court, under which nothing had been realized, tendered a bill of exceptions, this Court, at the instance of the plaintiff, stayed the proceedings until security for costs of the bill of exceptions and in error had been given by the defendant, without interfering with the plaintiff's liberty to proceed on his judgment.

Per *Pollock, C. B. and Watson, B.*  
—Such order does not stay the sealing of the bill of exceptions. *Hill v. Fox*, 547

### (3). *Month's Notice of Intention to Proceed.*

Rule 176, Hil. T., 1853, requiring a month's notice of intention to proceed where there have been no proceedings for one year, applies to the signing of judgment for not proceeding to trial under the 101st section of the Common Law Procedure Act, 1852. *Metcalf and Others v. Hetherington*, 755

### (4). *Setting aside order to change Venue.*

The Court will not interfere to set aside a Judge's order to change the venue made after issue joined, the defendant being under terms of taking short notice of trial, on the ground that the affidavit on which the order was made was insufficient. *Cartwright v. Frost*, 278

## PRINCIPAL AND AGENT.

### (1). *Contracts made by General Agent.*

Where a person permits another to act as his *general agent*, he is bound by a contract made by the agent, although the latter declares himself as acting "by procuration," and has received special instructions which he exceeds.

The defendant, who formerly carried on the business of a corn merchant at Limerick, came to reside in London, and left his brother M. to conduct his business in Limerick. The defendant's name remained over the door. For the space of three years M. purchased large quantities of oats, and chartered numerous ships on account of the defendant. On these occasions the defendant usually sent him special instructions. In the year 1858, a ship in the port of Limerick being about to proceed to Quebec for a cargo of timber, M. chartered her to carry, on her return from Quebec, a cargo of oats to London. He signed the charter-party "per procuration." In an action against the defendant for not loading a cargo pursuant to the charter-party:—*Held*, that it was properly left to the jury to say whether the defendant had allowed M. to act as his *general agent*, and if so he was liable although M. might have exceeded his authority.

In an action against the charterer of a ship for not loading a cargo, the measure of damage is the amount of freight which would have been earned after deducting the expenses, and also any profit which the ship may have earned, during the period over which the charter extended.

*Semble*, that the shipowner is not bound to take a new cargo for the most he can get, in order to reduce the damages to be paid by the charterer. *Smith v. Thomas M'Guire*, 554

(2). *Discharge of Principal by Conduct.*

Where a party who has dealt with an agent, has by his conduct led the principal to believe that he looked to the agent alone for payment, and thereby induced the principal, after the debt has become due, either to pay the agent the amount, or allow him to retain it out of the principal's money in his hands, the party so acting cannot afterwards resort to the principal.

The plaintiff, the owner of a ship, applied to a broker to effect an insurance on it; the broker signed a policy on behalf of the defendant, an underwriter. The ship was lost, and the plaintiff having applied to the broker for payment received from him a credit note. It was usual to pay credit notes at a month from their date. Both at the time of signing the policy and of the adjustment, the broker had money of the defendant sufficient to pay the loss. Nearly three months after the credit note was given the broker stopped payment, when the plaintiff applied to the defendant for the amount of the loss.—*Held*, that there was no injury to the defendant by the conduct of the plaintiff which rendered it unjust to call on him for payment, and therefore the case did not fall within the above rule of law. *Macfarlane v. Giannacopulo*, 860

PRINTER.

*Compositors' Charge.*

Disputes having arisen between compositors and master printers as to payment to the former for printing advertisements on wrappers, the following rules were made by a com-

mittee of each body :—" Wrappers. The compositor on a magazine or review to be entitled to the first or title page of the wrapper of the magazine or review, but not to the remaining pages of such wrapper or to the advertising sheets which may accompany the magazine or review. Standing advertisements or stereoblocks forming a complete page, or when collected together making one or more complete pages in a wrapper or advertising sheet of a magazine or review, not to be charged. The compositor to charge only for his time in making them up. The remainder of the matter in such wrappers or advertising sheets, including standing advertisements or stereoblocks not forming a complete page, to be charged by the compositor and cast up according to certain articles of the scale referred to, as they may respectively apply." In the November number of a Monthly Magazine there was composed and printed on one page two advertisements which occupied the entire page, and the type of which was left standing. In the December number, the same two advertisements were printed, but on different pages: and each occupied about half a page and the remainder of the page was filled up by other advertisements. The plaintiff, who was a compositor, insisted that, under the latter part of the rule, he was entitled to charge for the composing; the defendant, who was the master printer, contended that the case was within the first part of the rule, and that the plaintiff was only entitled to charge "for his time in making up." In the year 1856, a similar dispute arose between a compositor and a master printer, and the matter having been referred to arbitration in pursuance of certain rules which were still in force, three arbitrators awarded in

favour of the master. The plaintiff entered the defendant's service with knowledge of that decision, and that the defendant had been one of the arbitrators; nothing, however, was said as to the terms of payment; but both parties understood that it was to be made according to the rules.

*Held*: First, that the decision of the arbitrators was not, at the time of the employment of the plaintiff, binding between the parties as an interpretation of the rule; and that notwithstanding their decision it was competent for the Court to entertain the question of its construction.

Secondly, that the plaintiff was entitled to recover for the composing; the true construction of the rule being: that the compositor may charge according to the scale when any advertisement not standing is inserted in the same page with a standing advertisement, but that when standing advertisements are printed in the same page so as completely to fill it, the compositor is only entitled to charge for his time in making up.

Also *Held*, by the Court of Exchequer Chamber, (affirming the judgment of the Court of Exchequer); first, that the decision of the arbitrators was not, at the time of the employment of the plaintiff, binding between the parties as an interpretation of the rule; and that notwithstanding their decision it was competent for the Court to entertain the question of its construction.

Secondly, that the plaintiff was entitled to recover for the composing; the true construction of the rule being: that the compositor may charge according to the scale when any advertisement not standing is inserted in the same page with a

standing advertisement, but that when standing advertisements are printed in the same page so as completely to fill it, the compositor is only entitled to charge for his time in making up. *Hill v. Levey and Another*, 7, 702

### PRISONER.

*Conduct of his Cause at Trial in Person.*

A plaintiff in lawful custody for debt is not entitled *as of right* to a writ of habeas corpus to bring him up to conduct his cause in person at the trial. *Ex parte Cobbett*, 155

### PROMISSORY NOTE.

See BILL OF EXCHANGE.  
JOINT STOCK COMPANY, (4).

### PROVISO.

See INCOME TAX, (2).

### PUBLICAN.

See LICENSED VICTUALLER.

### RACE.

See HORSE RACE.

### RAILWAY COMPANY.

See CARRIER.  
MORTGAGE, (1).  
STATUTE OF FRAUDS.

(1). *Subscribers' Agreement—Change in Amount of Capital, Number of Shares and Extent of Line.*

The subscribers' agreement of a proposed Company stated that it was formed for making a railway to be called "The Galway and Kilkenny Railway," and to commence at Kilkenny and terminate in the town of Galway, the capital to be one million in shares of 25*l.* each. The deed empowered the directors to abandon the undertaking, or any part thereof and also to make application to parliament for an Act for any of the purposes aforesaid: also to fix upon, and from time to time to alter or vary the termini, route, course, or line of the railway; and to determine whether and how far, and to what extent the undertaking should be carried into effect and deferred or abandoned: and in case any act should authorize the construction of a part thereof, to make in any subsequent session application for the construction of the remainder. The defendant executed the deed as a subscriber for 150 shares, and paid the deposit of 1*l.* 10*s.* per share. The directors applied to parliament and an Act passed (9 & 10 Vict. c. ccclx.) which incorporated the Company by the name of "The Kilkenny and Great Southern and Western Railway Company," for making a railway from Kilkenny to Cuddagh, the capital of the Company to be 225,000*l.* in 11,250 shares of 20*l.* each. After the Act passed the defendant was placed on the register of shareholders as a subscriber for fifty shares of 20*l.* each:—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the defendant was a shareholder in the incorporated Company, and liable as such to execution on a judgment recovered by a creditor against the Company.

The 86th section of the Companies Clauses Consolidation Act, 8 & 9

Vict. c. 16, which enables execution to issue "against any of the shareholders," if the execution against the property or effects of the Company proves ineffectual, means shareholders at the time of the sheriff's return of nulla bona:—So *Held*, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer. *Nixon v. Brownlow. Nixon v. Green*, 686

(2). *Wood Burnt by Sparks from Locomotive.*

A wood adjoining the defendants' railway was burnt by sparks from the locomotives. On several previous occasions it had been set on fire, and the Company had paid for the damage. Evidence was given that the defendants had done everything that was practicable to the locomotives to make them safe, but it was admitted that with these precautions the locomotives had been the means of occasionally setting fire to the wood. The banks of the railway were covered with inflammable grass. The jury found the Company guilty of negligence.

*Held*: First, that, assuming the fire to have been caused by lighted coals from the locomotives falling in the plaintiff's wood, the defendants were liable.

Secondly, that they were not excused by the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 86.

Thirdly, that if the fire broke out on the defendants' land and was communicated to the wood from the banks of the railway, there was evidence to justify the verdict; and that the defendants were not protected by the 14 Geo. 3, c. 78, s. 84.

Fourthly, that it was no defence that the plaintiff had allowed his

wood to become peculiarly liable to take fire by neglecting to clear away the dry grass and dead sticks. *Vaughan v. The Tuff Vale Railway Company*, 743

(3). *Sale of Carriages for Toll.*

By the 8 & 9 Vict. c. 20, s. 97, it is provided that if, on demand any person fail to pay the tolls due in respect of any carriage, &c., it shall be lawful for the Company to detain and sell the carriage, &c., of the party liable to such tolls, and out of the monies arising from such sale to retain the tolls.—*Held*, that a demand of the sum actually due for tolls is a condition precedent to the right to sell under this section.

By the 9 & 10 Vict. c. ccciii., s. 29, a railway Company were empowered to take tolls for the use of their railway in respect of the tonnage of articles conveyed upon the railway certain sums per ton, and a further sum if conveyed in the carriages of the Company; and by s. 30, tolls for the use of engines. Section 35 fixed a maximum rate of charge, including the charges for the use of carriages, waggons or trucks, and for locomotive power, and all other charges incident to such conveyance. By section 37, the Company were empowered to take increased charges for the conveyance of goods, by agreement with the owners of goods, by reason of any special service. The Company having for a considerable time carried on their line coals in carriages belonging to the plaintiff, from P. to H., made a demand of a gross sum equal to the amount of the tonnage rates for coals and use of engines; and also of a sum claimed by them for sending back the plaintiff's empty carriages from H. to P. They gave no explanation of the

items making up the gross sum claimed. The plaintiff having omitted to pay the amount claimed, the Company sold the plaintiff's carriages, &c., to satisfy the amount due.—*Held*, that the sum claimed for sending back the return waggons was not toll, and that the Company having demanded a larger sum than that due for tolls, the sale was unlawful.

*Semble*, that the Company might be entitled to charge for sending back the waggons by agreement as for special services under section 37. *Field v. The Newport, Abergavenny and Hereford Railway Company*, 409

cells, called the honeycomb pattern, and it consisted of a combination of the large and small honeycomb, so as to form a large honeycomb stripe on a small honeycomb ground. The large honeycomb was not new and the small honeycomb was not new, but they had never been used in combination before the plaintiffs registered their design. Other fabrics had been woven with a similar combination of a large and small pattern. In an action against the defendant for infringing the plaintiffs' copyright.—*Held*, that the design was not "new and original" within the meaning of the 5 & 6 Vict. c. 100. *Harrison and Another v. Taylor*, 801

## RAILWAY DEBENTURES.

*See* MORTGAGE, (1).

## RATE.

*See* DISTRESS, (2).  
LANDLORD AND TENANT.

## REASONABLE AND PROBABLE CAUSE.

*See* BANKRUPT, (2).

## RECTOR.

*See* COMMON LAW PROCEDURE  
ACT, 1854, (5).

REGISTRATION OF DESIGNS  
ACT, (5 & 6 Vict. c. 100).

The plaintiffs registered, under the 5 & 6 Vict. c. 100, a design for ornamenting woven fabrics. The design was applied to a fabric woven in

## SALVAGE.

*See* MERCHANT SHIPPING ACT,  
1857.

## SECURITY FOR COSTS.

*See* PRACTICE, (2).

## SETTLEMENT.

*See* INCOME TAX, (1).  
LEGACY DUTY, (2).  
POWER.

## SEWER.

*See* CHELTENHAM IMPROVEMENT  
ACT.

## SHERIFF.

(1). *Interpleader*.

Goods having been seized in execution and claimed, the mere fact that the undersheriff was attorney



for the claimant at the time of the seizure, and prepared and caused to be served on himself as undersheriff a notice of claim on behalf of such claimant, will not disentitle the sheriff to relief under the interpleader Act. *Holt v. Frost*, 821

(2). *Rule to return Writ.*

A sheriff having been ruled to return a writ more than six months after the expiration of his office, the London agent of his undersheriff obtained an order for a week's further time to return the writ.—

*Held*, that obtaining the rule after six months was merely an irregularity, and that such irregularity was waived by obtaining the order for further time to return the writ.

*Walker v. Davis*, 374

(3). *Notice of Settlement of Action.*

In February 1857, the defendant, a sheriff's officer, received from the undersheriff a warrant to execute a writ of ca. sa. issued on a judgment recovered against A. the now plaintiff, by B. On the 20th April, B.'s attorney wrote to the defendant to suspend the execution for fourteen days. On the 2nd May, B.'s attorney wrote to the defendant as follows:—"This action having been arranged, we have given, Mr. G." (A.'s attorney), "who informs us he has paid your charges, notice of withdrawal of ca. sa." On the same day B.'s attorney wrote to A.'s attorney acknowledging the receipt of money in settlement of the action. No notice of the withdrawal of the ca. sa. was sent to the sheriff or undersheriff. On the 7th November, the undersheriff wrote to the defendant to execute the ca. sa., and he accordingly arrested and imprisoned A. under that writ.

In an action of trespass by A. against the defendant. *Held*, first, that the notice to the defendant by the letter of the 2nd of May was notice to the sheriff. Secondly, that the letter was in terms a sufficient notice that the action was settled and the ca. sa. withdrawn. *Futcher v. Hendor*, 757

(4). *Detainer on Ca. Sa.*

Plaintiff having a judgment against the defendant lodged a writ of ca. sa. with the sheriff, and afterwards by letter gave directions "not to execute the writ till further notice." The defendant being arrested on another writ, the officer detained him on the plaintiff's writ till he had communicated with the plaintiff, and then, on the plaintiff's instructions, let the defendant go:

*Held*, that, the defendant not having been legally in custody under the plaintiff's writ, the debt was not satisfied by the detention and subsequent discharge of the defendant. *Semple v. Keen*, 753

"*Blackleg.*"—" *Cheating Gambler.*"

The plaintiff and defendant being present in a public house where there had been a raffle, the defendant said "I am surprised at R. allowing a blackleg in this room." A witness being asked what he understood by "blackleg," said, "a person in the habit of cheating at cards." The question was objected to, but allowed. The Judge told the jury that if the plaintiff meant to charge the defendant with being a gambler simply the action would not lie, but if he meant to impute that he was a

cheating gambler they would find for the plaintiff.

*Held:* (Per *Pollock*, C. B., and *Watson*, B.)—First, that it is not actionable without special damage to call a man a blackleg, because it does not necessarily mean a cheating gambler.

Secondly, that the evidence as to the meaning of the word "blackleg" was not admissible.

Per *Martin*, B., and *Bramwell*, B.—First, that, under the circumstances, it must be taken that the defendant did make use of the word with intent to convey to the minds of those present that the plaintiff was a cheating gambler, and that therefore the action was maintainable.

Secondly, that the evidence was admissible. *Barnet v. Allen*, 376

## SOLICITOR.

*Right to sue for Costs before Termination of Suit.*

Plaintiff, a solicitor, employed by the defendant a procureur ami in a suit in Chancery, sent in his bill before the termination of the suit. The defendant contended that he was not responsible. The solicitor then wrote offering to go on if a certain sum was paid him, and if the defendant would admit that he was personally responsible. The defendant not consenting to this:—*Held*, that the solicitor was entitled to sue for his costs without waiting for the termination of the suit.

Per *Martin*, B., and *Channell*, B.—The rule, that a solicitor cannot sue for his costs till the termination of the suit in which he is employed, is subject to an exception where the client comes forward and disclaims his liability. *Hawkes v. Cottrell*,

43

## STATUTE OF FRAUDS.

*Acceptance and Receipt of Goods within 17th Section.*

A. agreed verbally to buy of B. all the whalebone he could procure at a certain price, to be sent by a particular railway, A. agreeing to pay the carriage. Some whalebone, to an amount exceeding 10*l.*, having been delivered at the railway station by B. consigned to A., and having been duly invoiced to him, was lost in the transit. B. then wrote requesting A. to make a claim against the Company.—*Held*, that there having been no acceptance and receipt of the goods within the 17th section of the Statute of Frauds, A., the consignee, was not entitled to sue the railway Company for the loss. *Coombs v. The Bristol and Exeter Railway Company*, 510

## STATUTE OF LIMITATIONS.

(3 &amp; 4 Wm. 4, c. 27).

*Acknowledgment of Title.*

In 1818 the plaintiff and the defendant's grandfather became seised as tenants in common of a meadow. The meadow was then in the possession of the defendant's grandfather, who had previously held it under a lease. The plaintiff's father became possessed in 1826, and so continued till his death in 1836. In 1837 Newton, who was proved to be a land agent who received the defendant's rents and managed his property, wrote the following letter to the plaintiff's agent:—"Sir,—Mr. P. (the defendant) is now in

possession of his 2-3rds of the meadow, who will no doubt accept a lease (three lives) for Ley's (the plaintiff's) 1-3rd at a fair rack-rent. You must be aware Mr. P. is not bound to pay rent for Ley's 1-3rd during the time his father held the meadow, but no doubt he will do so in case you agree for a lease. Signed J. Newton. Will you favour me with the terms of a lease for the 1-3rd of the meadow that I may lay it before Mr. P." No answer was shewn to have been given to this letter, but the defendant continued in possession of the land down to 1857, when an action of ejectment was commenced. It was not shewn that either the defendant or his predecessors had paid any rent to the plaintiff since 1818. Newton was in Court, but not called as a witness by the defendant.—*Held*, that the letter was not a sufficient acknowledgment of the plaintiff's title within the 14th section of the 3 & 4 Wm. 4, c. 27.

*Held*, also, by *Bramwell*, B., *Watson*, B., and *Channell*, B.; dissentiente *Martin*, B.—That the latter, coupled with the other facts, was not evidence from which the creation of a tenancy at will could be presumed.

*Quære*, whether the letter was admissible in evidence against the defendant. *Ley v. Peter*, 101

## STAY OF PROCEEDINGS.

*See Costs* (1).

## SUCCESSION DUTY.

- (1). *Estate Vested in Interest before Act—in Possession after Act.*

A testator devised his real estate

to D. for life, and after D.'s decease to his eldest and other sons in tail male: and in default of such issue to H. for life, and after his decease to the eldest son of H. for life, with remainders over. The testator died in June, 1835, leaving D. and H., and the defendant (the eldest son of H.), him surviving. H. died in November, 1849, leaving the defendant him surviving. On the 19th of May, 1853, "The Succession Duty Act, 1853," came into operation. In November, 1856, D. died, whereupon the defendant succeeded to the estate under the testator's will.—*Held*, that the defendant was chargeable with duty under the 2nd section of "The Succession Duty Act, 1853." *The Attorney General v. Lord Middleton*, 125

- (2). *Resettlement of Entailed Estates.—Relinquishment of Annuity.*

A testator devised his estates in L. to his brother C. for life, with remainder in tail to his first and other sons. On the 22nd March, 1848, C. and the defendant, his eldest son, executed a disentailing deed, whereby they limited the estate to such uses as they should jointly appoint, and in default of such appointment to the uses declared by the will of the testator. On the same day C. and the defendant executed another disentailing deed of estates devised to them by another testator and also limited them to such uses as they should jointly appoint. On the 23rd March, 1848, C. and the defendant executed a joint appointment, whereby, after reciting the two disentailing deeds, and certain arrangements made in respect of incumbrances with other stipulations, they appointed the estates of L. to the use that the defendant might receive thereout the yearly sum of 1000*l.* during the

## TIME.

joint lives of himself and C., and subject thereto to the use of C. for life in restoration, corroboration, and confirmation of his previous life estate, and after his decease to the use of the defendant for life, and after his decease to the use of his eldest son for life, with remainder in tail male. In the year 1855 C. died.

*Held*: First, that the defendant took a succession under a disposition made by himself, within the meaning of the 12th section of "The Succession Duty Act, 1853," and was therefore chargeable with duty at the rate of 3 per cent.

Secondly, that the defendant was not entitled under the 38th section to any allowance in respect of the 1000*l.* a year which ceased on the death of C. *The Attorney General v. Major Sibthorp*, 424

### (3). *Deduction for Income Tax and charge for Collecting Rents.*

In estimating the value of a succession to land, under "The Succession Duty Act, 1853," (16 & 17 Vict. c. 51), the successor is not entitled to a deduction for income tax, or the agent's charges for collecting rents. *In the Matter of the Succession of John Emilius Elwes*, 719

## SUNDAY.

*See* LICENSED VICTUALLER.

## TENANCY AT WILL.

*See* STATUTE OF LIMITATIONS.

## TIME.

*Of Court Sitting.*

## VENDOR AND VENDEE. 947

The time appointed for the sitting of a Court must be understood as the mean time at the place where the Court sits, and not Greenwich time, unless it be so expressed. *Curtis v. March*, 866

## TOLL.

*See* RAILWAY COMPANY, (3).

## TRESPASS.

*See* BANKRUPT, (2).

CONSTABLE.

PLEADING, (2).

## TROVER.

*See* BILL OF SALE, (5).

INSURANCE.

## TRUSTEE.

*See* LIVERPOOL DOCKS.

## UNDERSHERIFF.

*See* SHERIFF.

## VENDOR AND VENDEE.

*When Property vests in Vendee.*

The defendants, merchants at Bristol, through a broker, contracted to buy of the plaintiffs, merchants at Rotterdam, ten tons of the best refined rape oil, to be shipped "free on board" at Rotterdam in September 1857, at 48*l.* 15*s.* per ton, to be paid for, on delivery to the defendants of the bills of lading, by bill of exchange to be accepted by the defendants payable three months after date, and to be dated on the day of shipment of the oil. On the 8th of September the plaintiffs (having on the previous day advised that the shipment

would be made) shipped on board a general ship, trading between Rotterdam and Bristol, five tons of the oil, and the master signed a bill of lading by which the oil was deliverable "unto shipper's order;" and the plaintiffs indorsed it specially to the defendants. On the same day the plaintiffs inclosed in a letter to the broker the bill of lading, invoice and a bill of exchange drawn on the defendants in accordance with the contract. On the night of the 9th the ship with the oil on board was run down in the Bristol Channel and the oil totally lost. The plaintiffs' letter of the 8th arrived at Bristol on the afternoon of the 10th in due course of post, but after business hours. On the morning of the 11th the broker left with the defendants the bill of lading, invoice and bill of exchange for their acceptance. At that time he knew of the loss of the ship. In about two hours afterwards the defendants returned to the broker the documents left with them, on the ground that, under the circumstances, they were not liable to pay for the oil. In an action for not accepting the bill of exchange, and for goods sold and delivered:—*Held*, that the property in the oil vested in the defendants on its delivery on board the ship, and consequently the plaintiffs were entitled to recover on both counts: Per *Pollock*, C. B., *Martin*, B., and *Channell*, B.—*Bramwell*, B., dissentiente. *Browne and Another v. Hare and Another*, 481

## VENUE.

See PRACTICE, (4).

## WAREHOUSEMAN.

See BAILOR AND BAILEE.

## WATER.

## WARRANT OF COMMITMENT.

See MASTER AND SERVANT, (2).

## WATER.

*Case for Fouling—Against Stranger by Person taking Water by Licence of Owner.*

A declaration alleged that the plaintiffs were possessed of steam-engines and boilers, and used, had, and enjoyed the benefit and advantage of the waters of a certain branch canal to supply the same, and which waters *ought to have flowed and been without the fouling or pollution there-after mentioned*: yet the defendant wrongfully discharged into the water of the canal foul materials and thereby rendered the waters foul, whereby the plaintiffs' engines and boilers were injured. The defendant pleaded; first, not guilty: secondly, that the waters of the canal ought not to have flowed and been without the fouling mentioned. An arbitrator, to whom the cause was referred, found that the plaintiffs, by permission of a canal company, made a cut from the canal to their own premises, by which water got to those premises and with which water they fed the boilers of their engines. The defendant, without any right or permission from the Company, fouled the water in the canal, whereby the water as it came into the plaintiffs' premises was fouled, and by the use of it the plaintiffs' boilers were injured. Judgment having been given for the plaintiffs:

*Held*, in the Exchequer Chamber, by *Williams*, J., *Crowder*, J., and *Willes*, J., that the verdict upon the issue joined on the second plea ought to be found for the plaintiffs: by *Wightman*, J., *Erle*, J., and *Crompton*.

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*ton, J.*, that the verdict on that issue ought to be found for the defendant.

*Held* also, by *Crowder, J.*, and *Willes, J.*, that the declaration was good after verdict: by *Wightman, J.*, *Erle, J.*, *Williams, J.*, and *Crompton, J.*, that the judgment ought to be arrested. *Laing v. Whaley and Another*, 672, 901

## WILL.

*See* DOMICILE.

LEGACY DUTY, (2).

*Revocation within the 1 Vict.*  
c. 26, s. 20.

## WRECK.

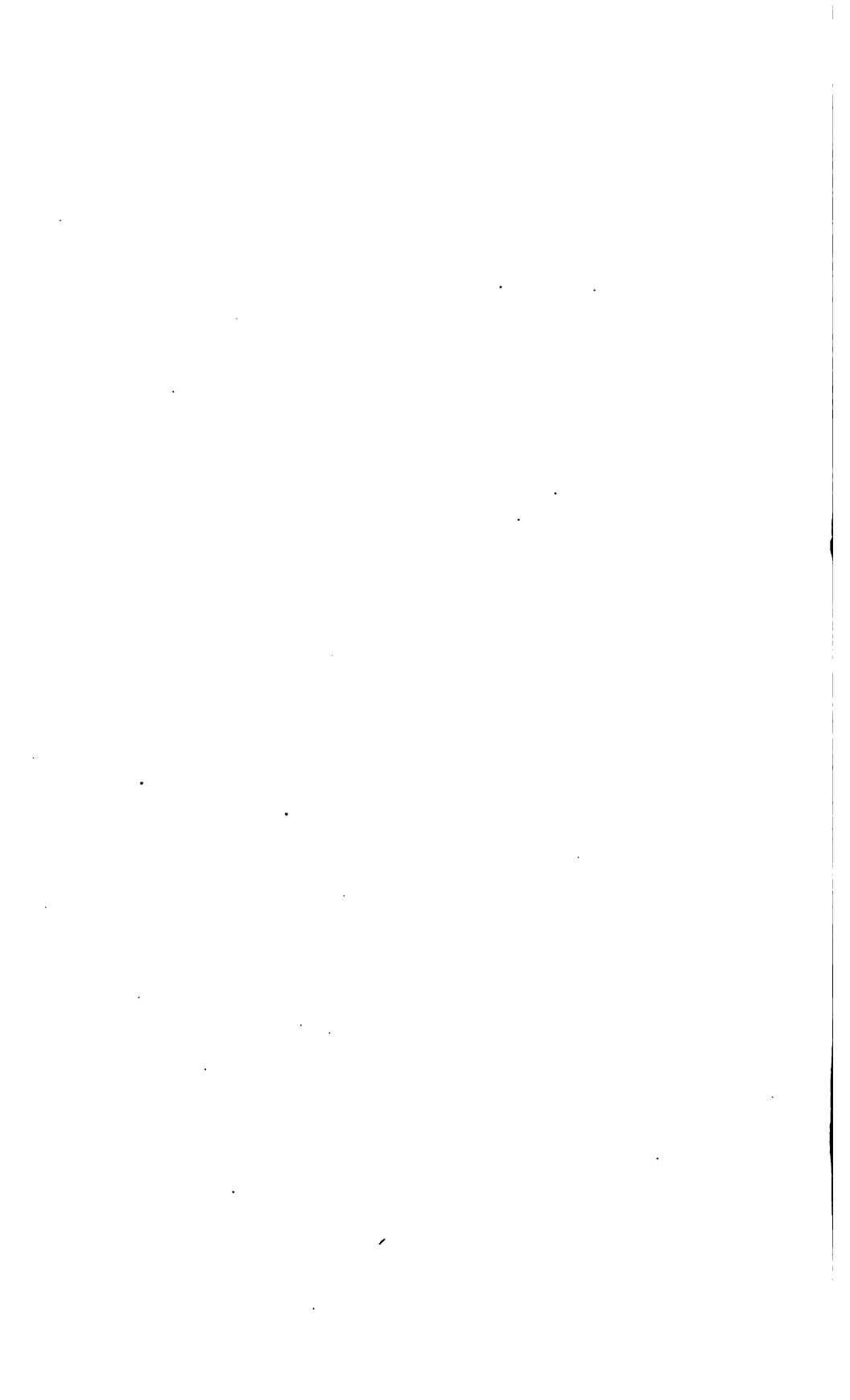
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A person having made his will, executed under seal and published and attested as a sealed instrument, afterwards, for the purpose of revoking it, tore off the seal and with it a part of a word:—*Held*, that the act of tearing off the seal was sufficient within the 20th section of 1 Vict. c. 26, and that the will was thereby revoked. *C. W. Price v. T. Powell and Maria his Wife*, 341

## WRECK.

*See* MERCHANT SHIPPING ACT,  
1854.

THE END.









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